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MEASURING THE VALUE OF SLAVES AND FREE PERSONS IN ANCIENT LAW

JAMES LINDGREN*

Not all people are considered equal. There have always been those who would treat others as less than fully human. Humans were not considered equal when Thomas Jefferson claimed that all men are created so—the same Jefferson who later enslaved his own relatives.¹ Humans were not considered equal in our earliest surviving law codes and collections (as this Study documents). And we are not all considered equal today.

With slavery having been almost eradicated in the modern world, the question of *equality* has replaced *freedom* as the world's chief

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I am grateful to Martha Roth for supervising this Article and for letting me use her new translations of the Mesopotamian law collections while they were still in draft. I must acknowledge helpful suggestions from Katherine Fischer Drew, Johannes Renger, Joseph Manning, Raymond Westbrook, Laurent Mayali, Marie-Theres Fögen, David Johnston, Bernard Jackson, Klaas Veenhof, N.P. Lemche, Peter Stein, James Whitman, Richard Helmholz, Ross Stolzenberg, Richard Posner, Charles Gray, Philip Hamburger, Saul Levmore, Robert Ellickson, Jacob Corre, Robert Cooter, and Geoffrey Miller. I would like to thank the Freehling Scholarship Fund of the Chicago-Kent College of Law and the University of Chicago Sociology Department for funding my studies in Sociology at the University of Chicago, and the University of Texas Law School and the Marshall D. Ewell Fund of Chicago-Kent for general support during the writing of this Article. For the inspiration to take comparative ancient law seriously, I must thank Saul Levmore, Orlando Patterson, and Robert Ellickson.

1. Even if you discount the story that Sally Hemings bore Jefferson's children as unproven, those who defend Jefferson do not dispute that Hemings' children were still Jefferson's relatives, since Hemings was the daughter of John Wayles (the father of Jefferson's wife Martha). Thus, at the very least, Jefferson enslaved his wife's half-sister (and half-brothers and their descendants). Also, Jefferson's modern defenders usually say that the father of Hemings' children was really Peter or Samuel Carr (Jefferson's nephews). Thus, even if Thomas Jefferson is not the father of Hemings' children, he is related to them both by blood and by marriage. Further, since Sally Hemings' mother was one-quarter white, Sally's children would be less than one-quarter black. Under Virginia law, her children were white and could not be legally enslaved. Thus, Jefferson's enslavement of his family members was illegal as well as immoral. Moreover, Jefferson once wrote in his notebooks that some of his slaves were probably legally white. See Paul Finkelman, *Jefferson and Slavery: "Treason Against the Hopes of the World,"* in *JEFFERSONIAN LEGACIES* 181-221 (Peter S. Onuf ed., 1993).

political concern. Among the hundreds of thousands of popular and academic writings on inequality, tens of thousands of them have tried to document differences between social classes or demographic groups. Wage gaps, discrimination gaps, and the like are the common fodder of public discourse. Differences between classes have been studied within nations and among nations by sociologists, economists, governments, and multi-national organizations.² What has not been measured until now is the comparative valuation of persons in ancient law collections.

This Study compares the valuation of slaves, freed slaves, half-free persons, free persons, and the nobility in ancient law systems from 2100 B.C. through A.D. 700. The price schedules for wrongs done to different classes of people are set out in considerable detail in many ancient law collections. These price schedules give us some indication of how these societies were stratified and what values were ascribed to the bodies and dignities of different classes. To ascertain the valuations, I quantified the relative prices for harms done to different sorts of people. If, for example, a particular harm to a slave was by law punished only 33% as severely as the same harm done to a free person, then a slave's valuation under that provision would be 33%.

Almost all ancient civilizations leaving codes³ and law collections that have been translated into English are represented, although I in-

2. See, e.g., PETER M. BLAU & OTIS D. DUNCAN, *THE AMERICAN OCCUPATIONAL STRUCTURE* (1967); *SOCIAL STRATIFICATION: CLASS, RACE, AND GENDER IN SOCIOLOGICAL PERSPECTIVE* (David B. Grusky ed., 1994); James A. Davis, *Achievement Variables and Class Cultures: Family, Schooling, Job, and Forty-Nine Dependent Variables in the Cumulative GSS*, 47 AM. SOC. REV. 569 (1982); William H. Sewell et al., *Sex, Schooling, and Occupational Status*, 86 AM. J. SOC. 551 (1980); Erik O. Wright, *A General Framework for the Analysis of Class Structure*, 13 POL. & SOC'Y 383 (1984).

3. In ancient law, no issue has been debated as extensively as whether these ancient law collections, particularly the ones from before the birth of Jesus, ought to be called "codes." See, e.g., JEAN BOTTÉRO, *MESOPOTAMIA: WRITING, REASONING, AND THE GODS* 156-84 (Zainab Bahrani & Marc van De Mieroop trans., 1992); Jacob J. Finkelstein, *Ammisaduqa's Edict and the Babylonian 'Law Codes'*, 15 J. CUNEIFORM STUD. 91 (1961); Raymond Westbrook, *Biblical and Cuneiform Law Codes*, 92 REVUE BIBLIQUE 247 (1985). The debate is too complex to be recapitulated here, but it turns in part on whether these were comprehensive enough to be called codes and in part on whether these were treated as prescriptive law.

The first argument, which usually contrasts these collections with the *Code Napoleon*, is an odd one, at least as applied to the more substantial law collections. Bottéro has argued that "The law code of a land is first of all a complete collection of the laws and prescriptions that govern the land: 'the totality of its legislation.'" BOTTÉRO, *supra*, at 161. Although I am skeptical that Bottéro is correct about the French use of the word "code"—what about the *Code Noir* (1685)?—as applied to the meaning of the modern English word "code," Bottéro's statement is either wrong or irrelevant (limited as it is to a code "of a land").

The meaning of a word cannot be determined by comparison to its most extreme examples. Must one be Michael Jordan to be an athlete? Is Lutheranism the only Protestant sect? The scope of the *Code of Hammurabi* is certainly much broader than the scope of the *Model Penal Code*, a nonbinding code that was drafted for state adoption. Even though no state has adopted

cluded only the earliest one or two for each civilization.⁴ In the tables in this Article, I describe, extract, and classify over 300 provisions that make distinctions based on class in seventeen ancient law collections. For the four Mesopotamian collections, I had access to new translations by Martha Roth;⁵ for the other codes or collections, I used translations of varying quality and age. Geographically, the codes range from India through Mesopotamia, Asia Minor, Palestine, (Grecian) Crete, Rome, Germanic Europe, and Britain. The ancient Chinese *T'ang Code*⁶ and the Japanese *Yoro Code*,⁷ among others, are ex-

it in its entirety, no one hesitates to call the *Model Penal Code* a "code." The French *Code Noir* dealt with slaves, the *Uniform Commercial Code* deals with commerce, and a university's code of conduct may deal mostly with a narrow range of student concerns. Many codes today are not binding law (a code of conduct for broadcasters or advertisers). They are often promulgated to guide business people, lawyers, judges, or legislators.

I have done NEXIS searches of newspapers and magazines to determine the ordinary meanings of "code" and "law collection." The word "code" is very rarely used to refer to a comprehensive body of binding law representing the core of a country's statutes. It usually refers to nonbinding collections of rules. In ordinary usage, the words "law collection" usually refer to a library's collection of unrelated legal books and periodicals. I found no use in NEXIS of "law collection" in the sense these words are used by historians today. The words "law collection" are not more precise than the word "code." The words "law collection" are what some grammarians call "covering language," vague words that raise few images at all. What images they do raise are probably more false than the ones raised by the word "code."

The second main argument made—that the codes may not have been prescriptive law—is a much more substantial one. It may be that they are what American lawyers call "restatements" or perhaps "digests." Yet modern restatements of the common law were generally thought of as attempts to "codify" the common law, even though they often were not designed to be enacted in whole as prescriptive law. Since codes need not be binding, perhaps "code" is the right word after all for the ancient law collections.

In short, historians may have a much better idea than a modern lawyer like myself about the uses of these law collections, but historians do not necessarily know what the word "code" means. It may be more pedantic than precise to call them "law collections." However, since that usage is the convention (and I am a lowly graduate student new to the field), I will usually use the words "law collections" instead of "codes."

The purpose of this footnote is not to challenge the reigning orthodoxy—that would require a careful review of each of the arguments made for the conventional terminology. Rather, I want to explain what may otherwise appear to be ignorance or terminological sloppiness. One should not take offense with my iconoclastic ways. I'm harmless.

4. Excluded, for example, are the later Mesopotamian law collections and the later Roman and Greek law collections (which have been extensively analyzed elsewhere). See, e.g., JILL HARRIES & IAN WOOD, *THE THEODOSIAN CODE* (1993) (discussing the *Theodosian Code*); MARTHA T. ROTH, *LAW COLLECTIONS FROM MESOPOTAMIA AND ASIA MINOR* (Piotr Michalowski ed., 1995) (translating the *Neo-Babylonian Laws* (ca. 700 B.C.) and the *Middle Assyrian Laws* (ca. 1076 B.C.)).

5. ROTH, *supra* note 4.

6. See *THE T'ANG CODE: VOLUME 1, GENERAL PRINCIPLES* (Wallace Johnson trans., 1979) (translation of 57 of the 502 articles of the *T'ang Code* of A.D. 627-659); Wallace Johnson, *Status & Liability for Punishment in the T'ang Code*, 71 *CHI.-KENT L. REV.* 217 (1995).

7. See 1 DAVID J. LU, *SOURCES OF JAPANESE HISTORY* 26-32 (1974) (excerpts from *Yoro Code*); RICHARD J. MILLER, *JAPAN'S FIRST BUREAUCRACY: A STUDY OF EIGHTH CENTURY GOVERNMENT* 22-55 (1978) (discusses origins and context of *Yoro Code* of A.D. 718); NIHONGI: *CHRONICLES OF JAPAN FROM THE EARLIEST TIMES TO A.D. 697* (W.G. Aston trans., 1972) (excerpts from *Yoro Code*); 1 RYUSAKU TSUNODA ET AL., *SOURCES OF JAPANESE TRADITION* 68-80 (1958) (excerpts from *Yoro Code* of A.D. 718).

cluded because they remain mostly untranslated into English.⁸ I also excluded other codes that cannot be firmly tied down to the pre-A.D. 700 era (i.e., pre-Charlemagne).⁹

According to the data presented here, in ancient law collections slaves were valued at a mean of only 33% of a free person.¹⁰ Freed slaves were valued at only 53% of free.¹¹ Nobility showed a wide variation, averaging 4.65 times the value of an ordinary free person.¹² Beyond these broad findings are several other interesting patterns. Dignitary wrongs such as face-slapping show wider variations between social classes than more narrowly economic harms.¹³ And much like the antebellum American South, field slaves are valued less than house slaves.¹⁴ Unlike American slavery, however, the ascribed value of slaves in ancient law was only 33%, not 60% (as in the United States Constitution's population computations¹⁵).

This Study also supports several findings of historians of ancient slavery—for example, (1) that freed slaves were still dependent classes, not far above the class of slaves,¹⁶ and (2) that slaves performed an extremely wide variety of tasks in ancient societies.¹⁷ Indeed, highly skilled slaves were sometimes valued above average free persons.¹⁸

The differences within basic classes are often huge. For example, some slaves belonging to the king are valued at 33 times more than other slaves. As noted, some slaves (e.g., goldsmiths) are valued

8. A later Japanese code has been translated. THE LAWS OF THE MUROMACHI BAKUFU (Kenneth A. Grossberg ed. & trans. & Kanamoto Nobuhisa trans., 1981) (translation of *Kemmu Shikimoku* (1336) and *Muromachi Bakufu Tsuikah*).

9. See, e.g., CELTIC LAW PAPERS (Dafydd Jenkins ed. & trans., 1973) (mainly Welsh and Irish laws); THE EARLIEST NORWEGIAN LAWS (Laurence M. Larson trans., 1935) (translations of the *Gulathing Law* and the *Frostathing Law*); 2 THOMAS P. ELLIS, WELSH TRIBAL LAW AND CUSTOM IN THE MIDDLE AGES 65-192 (1982) (Welsh law of crime and torts); SIDNEY FAIRBANKS, THE OLD WEST FRISIAN SKELTANA RIUCHT (1939) (translation of *West Frisian Code*); 1 ALBERT KOCOUREK & JOHN H. WIGMORE, SOURCES OF ANCIENT AND PRIMITIVE LAW 446-52 (1915) (Egyptian *Edict of Harmhab*, contains no differences in price schedule for wrongs); THE LAW OF HYWEL DDA (Dafydd Jenkins ed. & trans., 1986) [hereinafter THE LAW OF HYWEL DDA] (translation of medieval Welsh code); LAWS OF THE SALIAN AND RIPUARIAN FRANKS (Theodore J. Rivers trans., 1986) (includes translation of *Lex Ribuaria*, which is too derivative of the Salic laws to be included here).

10. See *infra* Tables 29-31.

11. See *infra* Tables 29, 31-32.

12. See *infra* Tables 29, 32.

13. See *infra* Table 5.

14. See *infra* Tables 23-24.

15. U.S. CONST. art. I, § 2, cl. 3.

16. See ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH 240-61 (1982) (describing the degraded status, both socially and legally, of freed slaves across a wide variety of slave societies).

17. See, e.g., THOMAS WIEDEMANN, GREEK AND ROMAN SLAVERY (1981).

18. See *infra* Tables 17 & 19.

higher than some free men.¹⁹ Within free classes, the differences can also be large. In the *Laws of Ine*, a harm to a bishop is punished 34 times more seriously than the same harm to a landed nobleman, even though both are upper-class persons.²⁰

More broadly, the data in this Study are consistent with a supposition that law was a tool of imposing and enforcing class hierarchy across all ancient legal systems that were sophisticated enough to develop a code of laws. Further, these data do not support the efficiency of ancient law that some modern theorists have found, for a slave system is unlikely to be economically efficient in the simplest sense, restricting labor from freely moving to its highest and best use.

These data also provide a statistical base for comparisons with the class relations in any particular ancient or modern civilization. Indeed, the relative valuation of nobility compared to free persons in ancient law systems (4.65 to 1) is eerily similar to the level of income difference between high and low prestige jobs that Americans today think proper (about 4 to 1).²¹

Last, this Study is intended to broaden the use of both ancient law and legal empiricism. It hints at some of the richness of ancient codes for modern theorists of race, class, gender, economics, sociology, jurisprudence, crime, and torts.²² Law professors tend to read narrowly only in law and those pockets of philosophy and social science that have become part of legal scholarship. Once some of these codes are more widely discussed by legal scholars, they will be used by others to enrich research that has little to do with the concerns of this study. Further, I designed this study as part of my over-arching desire to advance a developing school in academic law—the *New Empiricism*—and to show how the range of legal questions subject to quantitative techniques can be broadened in time, place, scope, and subject.

19. See *infra* Table 17.

20. See *infra* Table 27.

21. Jonathan Kelley & M.D.R. Evans, *The Legitimation of Inequality: Occupational Earnings in Nine Nations*, 99 AM. J. SOC. 75 (1993).

22. For using ancient law to ask modern questions, see RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 119-227 (1981); RAPHAEL SEALEY, *WOMEN AND LAW IN CLASSICAL GREECE* 50-81 (1990) (discussing women in Gortyn); Saul Levmore, *Rethinking Comparative Law: Variety and Uniformity in Ancient and Modern Tort Law*, 61 TUL. L. REV. 235 (1986); Saul Levmore, *Variety and Uniformity in the Treatment of the Good-Faith Purchaser*, 16 J. LEGAL STUD. 43 (1987); James Lindgren, *Why the Ancients May Not Have Needed a System of Criminal Law*, 76 B.U. L. REV. 29 (1995).

I. WHY COUNT CLASS DIFFERENCES?

In some respects, ancient class differences are a far more appropriate topic for counting than you might think. It might seem anachronistic to believe that quantifying ancient law makes any sense, but it is probably more anachronistic to impute our modern notions of the ineffable incomparability of human worth. A *wergeld*, after all, was a "man's price."²³ In some sense (which can be much debated), the *wergeld* was treated as the ascribed value of that person. Theodore Rivers describes the relation of the blood-feud to the *wergeld*:

Characteristic of primitive societies that lack a strong central government, such as Frankish society, is a phenomenon known as the blood feud, the perpetuating series of killings and counterkillings between members of two different kindreds. Since the kindred was marked by a strong sense of collective solidarity, it required that all its members be accountable for the actions of any of its members. Therefore, in order to maintain peace between potentially feuding kindreds, a monetary payment called the *wergeld* or *leodgeld* was instituted, which compensated the victim's kin with a payment equal to the victim's status within Frankish society. *The wergeld was equivalent to a person's legal value* When the victim's kin accepted payment of the *wergeld*, the feud ceased, at least in theory. But the *wergeld* was originally only a very poor attempt, at best, to put an end to familial reprisals of violence. . . . Since Germanic society was a caste system, different classes had different *wergelds*.

. . . .

The value of the property and the status of the victim or owner were the criteria by which crimes in Frankish society were redressed. Since all crimes had an equivalent value whose payment was assumed to amend the wrong of a crime, a graduated scale of composition—the monetary payment that settled a debt—evolved from this mentality. Composition was applicable to both the *wergeld* payment for homicide and the simple monetary compensation for all remaining types of crimes.²⁴

The statutory schedules often set out elaborate explicit values depending on one's station in life. At least for the lawgivers, these values were real and explicit. James Whitman remarks, "On their face, the archaic codes belong, not to a modern world characterized by the policing of the streets, but to a pre-modern world characterized by the deeply felt need to set just prices."²⁵ This Study compares these "just prices."

23. See THE EARLIEST NORWEGIAN LAWS, *supra* note 9, at 150-63.

24. LAWS OF THE SALIAN AND RIPUARIAN FRANKS, *supra* note 9, at 14-15 (emphasis added).

25. James Q. Whitman, *At the Origins of Law and the State: Supervision of Violence, Mutilation of Bodies, or Setting of Prices*, 71 CHI.-KENT L. REV. 41, 81 (1995).

Second, the lawgivers have solved the inherent incomparability problem by reducing their opinions about persons and classes to money or weighted metal. Sometimes, as in the *Hittite Laws*, the schedule of wrongs was revised, suggesting a positive use needing revision.²⁶ Sometimes, as in the *Lombard Laws*, the state's system competed with self-help. Section 74 of the *Lombard Laws* says that the price for injuries was raised to discourage the blood-feud (which was made illegal by section 45).²⁷ If this statement is correct, then the prices had to be accurate enough to prevent blood-feuds.

Third, this mode of thinking—determining social class by looking at the price schedules for wrongs—is standard procedure for modern translators and non-quantitative historians. It is common for historians to say that one class is higher than another because the prices for wrongs done to that class are higher.²⁸ Thus, I am not engaging in a form of reasoning alien to traditional historians. Rather, I am making such observations more systematic and comparing them statistically between civilizations. Making these observations more systematic in one instance allows me to correct the translator's descriptive error.²⁹

Fourth, slave prices at auction or in other records were subject to enormous variation based on individual differences between slaves and market changes. These variations were so large that generalizations are difficult to make from price records.³⁰ Far better for assessing class differences and social distance³¹ are legal price schedules abstracted from individual characteristics, based on unities of time, place, and situation.

Fifth, ancient law is particularly appropriate for the study of social classes because, with less egalitarian rhetoric to contend with, the lawgivers appear mostly unashamed to admit the differing worth of

26. See, e.g., the *Hittite Laws*, which frequently state that they are revisions of earlier punishments. ROTH, *supra* note 4, at 217-25.

27. See THE LOMBARD LAWS 61, 64 (Katherine F. Drew trans., 1973) (sections 45 and 74 discuss the blood-feud).

28. See, e.g., *id.* at 28-31 (uses the price schedule for wrongs to determine the social class of different sorts of free men, half-free men, and different sorts of slaves); THE LAW CODE OF GORTYN 10-14 (Ronald F. Willetts ed. & trans., 1967) (uses the price schedule to determine class status); O.R. GURNEY, THE HITTITES 70-72 (1952) (discussing the status of slave class based on prices for wrongs).

29. See the discussion of the *Visigothic Code* at Tables 25-26.

30. M.I. FINLEY, ANCIENT SLAVERY AND MODERN IDEOLOGY 129 (1980); cf. P. ANDERSON, PASSAGES FROM ANTIQUITY TO FEUDALISM 76-77 (1974); A.H.M. JONES, *Slavery in the Ancient World*, 9 ECON. HIST. REV. 185 (2d Ser. 1956).

31. I am using a simple intuitive measure of social distance. For more complex formal measures of social distance in network analysis, see, e.g., RONALD S. BURT, TOWARD A STRUCTURAL THEORY OF ACTION 43-47 (1982).

persons. Thus, some of the hierarchy that would be hidden in modern societies is explicit in ancient law collections. Some codes, for example, the *Laws of Hammurabi*, have been described as obsessed with status.³²

My enterprise is not unlike modern attempts to quantify the amount of price discrimination on account of race in product markets (i.e., car-buying³³), but here the prices are laid out in the law collections, rather than being elicited in prospective market transactions involving closely matched experimental testers. This research design is also similar to the efforts of modern economists to determine a price schedule for particular crimes based on time served and the chance of detection and conviction,³⁴ but I am restricted to the nominal punishment set out in the law collections. Sometimes these statutory penalties are set so high that they were probably not imposed; rather they might have served mostly as leverage in a system of bargaining.

If one were to take the frequently challenged view that the ancient Near Eastern law collections were binding law codes,³⁵ then they reflect the views of legislators or redactors. If one instead views them as the results of legal decisions in court, then these law collections reflect the valuation of social classes actually imposed by judges—arguably an even more important source of information. If one instead views the law collections as scientific academic treatises of examples on how the law was and should be applied, then these valuations reflect the views on social stratification of what one might call an ancient social scientist. If one instead views the law collections as the collected wisdom rules of the society, then these valuations reflect the collected wisdom of the societies from which they spring. Or if one instead views these law collections as the king's literary attempt to convince his subjects that he was a just and wise king, then these are reflections of what the king implicitly views as attractively just valuations of the social classes. In short, denying the binding nature of the law collections in no way invalidates my undertaking, and indeed may strengthen it. Because my interest is in the social structure that these

32. See Raymond Westbrook, *Biblical and Cuneiform Law Codes*, 92 REVUE BIBLIQUE 247 (1985).

33. Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991).

34. See, e.g., Morgan O. Reynolds, *Crime Pays, But So Does Imprisonment*, National Center for Policy Analysis, Policy Report No. 149 (Mar. 1990) (Reynolds computes that the discounted price of a murder is 2.3 years, rape is 3.5 months, robbery is 36 days, burglary is 7 days, and theft is 2 days).

35. See Klaas R. Veenhof, "In Accordance with the Words of the Stele": Evidence for Old Assyrian Legislation, 70 CHI.-KENT L. REV. 1717 (1995).

law collections reflect, my analysis does depend on these collections being reflective of the societies they come from (even if viewed from the top). But my analysis does not depend on the collections being binding law or being actually used by judges or litigants.

Cliometric methods can be overused. As long as cliometric methods are used as an adjunct to other methods and the truth claims are modest—as mine certainly are here—counting can shed light where traditional historians would otherwise have only impressions. As ambiguous and disparate as are the materials that I am examining, they still provide a method of comparison, a system of relative prices that can be used to make rough generalizations across ancient societies and to contrast individual civilizations with others.

II. PROBLEMS WITH COUNTING CLASS DIFFERENCES

The problems with counting class differences in ancient law codes and collections are significant—and not easily brushed aside. First, just like other scholars of ancient law, I am at the mercy of fate. Those codes that have survived by accident may not be representative of the codes that were promulgated. And societies that promulgated codes and law collections probably are not representative of all ancient societies—they are likely to be more literate, populated, complex, and spread out. Further, those collections that are translated into English are skewed toward European and Middle Eastern ones, with the primary Chinese code (the *T'ang Code*, A.D. 653³⁶) and Japanese code (the *Yoro Code*, A.D. 718³⁷) still awaiting full translations.

Second, the texts are often unclear, inconsistent, or marred by omissions. The original drafting is frequently sloppy or obscure. Unless class or gender differences are explicitly noted, it is often hard to know when general language is used whether the statute is, for example, speaking about all free persons or a particular class of free persons, or speaking about just men or both men and women. As Raymond Westbrook has noted, even the meaning of “slave” is unclear, for a free dependent of the king might be referred to in some contexts as his “slave.”³⁸ Meillassoux has argued, “No formal crite-

36. THE T'ANG CODE: VOLUME 1, GENERAL PRINCIPLES, *supra* note 6.

37. See 1 LU, *supra* note 7, at 26-32 (excerpts from *Yoro Code*); MILLER, *supra* note 7, at 22-55 (discusses origins and context of *Yoro Code* of A.D. 718); NIHONGI: CHRONICLES OF JAPAN FROM THE EARLIEST TIMES TO A.D. 697, *supra* note 7 (excerpts from *Yoro Code*); 1 TSUNODA, *supra* note 7, at 68-80 (excerpts from *Yoro Code* of A.D. 718).

38. Raymond Westbrook, *Slave and Master in Ancient Near Eastern Law*, 70 CHL-KENT L. REV. 1631 (1995); see I.J. Gelb, *From Freedom to Slavery* 84-85 (1972) [hereinafter *From Free-*

tion has been brought to light that permits a categorical distinction between slaves and all other components."³⁹ Considerable judgment is often involved in the coding of sections. Should, for example, additions besides the fine be included (e.g., medical expenses, lost wages)?

Third, some translations are less than ideal. Occasionally, I was able to resolve ambiguities by looking at the original text in the original languages, but in most cases I was forced to rely on the translators' skills.

Fourth, the numbers may understate the real differences between classes for two reasons. Perhaps like most Western societies today, the social classes are farther apart than laws would suggest. Also, some of the largest differences in punishments, such as between a fine and death, will be excluded from the data because the punishments are not comparable.

Fifth, the numbers may overstate the real differences between classes for two reasons. Undoubtedly, I have not included some provisions treating classes the same because I was unsure whether the section referred to the ordinary free class or to all persons. Also, I may overstate differences between classes because the laws may not have been actually applied. Thus, some of the differences may not have been socially sustainable in practice.⁴⁰

Sixth, by trying to generalize across two continents and two-and-a-half millennia, I am inevitably compressing differences between civilizations, rather than illuminating them. By looking at relative values, I am automatically making comparisons between systems possible and comprehensible, but this is one of many variations between societies. The social structure of some societies is made up of only two or three classes, while others seem to have dozens of fine gradations. Only some of these subtleties can be captured in summary tables.

Seventh, I have confined myself to codes and law collections. Only a small part of law is reflected in a code or law collection and only a small part of a civilization's social structure is reflected in any part of its laws. Thus, my generalizations about social classes may reflect the reality of everyday life or they may not. More likely, the prices reflected only the lawgiver's evaluations of the worth of

dom to Slavery]; see also, I.J. Gelb, *Definition and Discussion of Slavery and Serfdom* 283-97 (1979) [hereinafter *Definition and Discussion of Slavery and Serfdom*].

39. C. MEILLASSOUX, *L'ESCLAVAGE EN AFRIQUE PRECOLONIALE* 20 (1975) (discussed in FINLEY, *supra* note 30, at 69).

40. See *infra* Table 23 (difference in *Lombard Laws* between men and women accosted on the road is so large that it is probably not socially sustainable).

classes—but this is still an important observer's estimation of a society by someone who lived in it and promulgated his estimations for others to see.

Eighth, although it may seem that the data merely count what they count, for the data to make any sense, the laws must usually treat crimes against lower classes as less serious (or at least no more serious) than crimes against higher classes. As you will see, this assumption is not borne out in the *Laws of Manu*, which are more concerned with the pollution of the wrongdoer by contact with the lower classes than with any harm to the victim.⁴¹ Thus, the *Laws of Manu* are excluded from the summary statistics at the end of this Article. Further, individual laws may be based on many confounding considerations, such as a “pedestal effect” for crimes against women,⁴² the identity of the person who actually collects the fine, whether the crime is economic or dignitary, and so on. Class may interact with other variables in ways not controlled for.

Last, and most significantly, this Study is limited by my own ignorance. It suffers to an extraordinary degree from the most common problem that comparativists face. No one could be an expert in each of the civilizations that are covered in this study. Yet I am an expert in none of them. This fact alone should give a reader pause before relying too heavily on my findings.

III. METHODOLOGY

My methods were simple. Trying to hold other things constant—the kind of wrong committed and the class and gender of the wrongdoer—what penalties were imposed for wrongs against different social classes or the property or dependents of different social classes? First, the value of the free class was set at 1. Then the values for other classes were determined as a percentage of their relative value to that of the free class.⁴³ Sometimes my tables describing statutory provisions describe more classes and gradations within classes than I include in the summary statistics. Sometimes when the punishments are not comparable, for example, a fine for one class and corporal punishment for another, I excluded them from the tables or summaries. In my summary statistics, I excluded the king and the palace from the

41. See *infra* Tables 15-16.

42. See *infra* Table 23.

43. For any sets of comparative provisions that had no free class to calibrate the values, the class with the most observations was assigned first, and the other classes were set by comparison with that class.

measurements of upper classes or nobility. Even in our day, a head of state is special, different from other aristocratic groups.

The metric in which the original price was paid was either a particular weight in metal (most often silver) or money, or occasionally physical punishment (e.g., the number of lashes). Since my measures are comparative and relative, it does not matter whether the original payments were in metal or in money, and I frequently refer loosely to payments in weighted metal as payments in money.

The classification of social status proved to be even more difficult than I had imagined. Sometimes provisions made slight differences in wording such that it was difficult to determine whether the same delict was being prohibited. Sometimes it was difficult to determine which social class should be denominated as the fully free one.⁴⁴ Sometimes when several levels of free persons or slaves are discussed, it was difficult to ascertain which is the *ordinary* slave or free person. When provisions gave directly inconsistent provisions for the same offense against free persons, those sections were averaged to retain the mean of 1 for fully free classes.

IV. THE ANCIENT LAW CODES AND COLLECTIONS

A. *The Ancient Sumerian Law Collections: Ur-Namma and Lipit-Ishtar*

The earliest recorded law collections are from ancient Mesopotamia—the *Laws of Ur-Namma* (ca. 2100 B.C.) and the *Laws of Lipit-Ishtar* (ca. 1930 B.C.).⁴⁵ Both of the surviving texts are in Sumerian. The *Laws of Ur-Namma* (often called *Ur-Nammu*) come from the city of Ur in southern Mesopotamia.⁴⁶ They are attributed to King Ur-Namma (r. 2112-2095) or his son, King Shulgi (r. 2094-2047).⁴⁷

44. For example, in the *Laws of Eshnunna* and the *Laws of Hammurabi*, there were two basic free classes, the *Awilum* and the *Muskenum*. See REUVEN YARON, *THE LAWS OF ESHNUNNA* 132-62 (2d rev. ed. 1988); Martha T. Roth, *Mesopotamian Legal Traditions and the Laws of Hammurabi*, 71 CHL-KENT L. REV. 13 (1995). Since the *Muskenum* was the lower class, it might at first glance seem more sensible to assign them the value of 1. Yet often the codes use the word *Awilu* to refer to a free man in a form that includes both *Muskenum* and *Awilum*. Thus it would be nonsensical to assign a value of 1 to the *Awilum* in one section and a higher value to *Awilum* in another section. Thus, the *Awilum* are assigned a value of 1 in all sections and other classes are measured against *Awilum*.

45. ROTH, *supra* note 4, at 13-35 (all the dates of the Mesopotamian law collections are from Roth); Raymond Westbrook, *The Nature and the Origins of the Twelve Tables*, in TH. MAYER-MALY ET AL., *ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE* (1988).

46. Westbrook, *supra* note 45, at 84.

47. ROTH, *supra* note 4, at 13; P. Steinkeller, *The Administrative and Economic Organization of the Ur III State: The Core and the Periphery*, in MCG. GIBSON & R.D. BIGGS, *THE OR-*

The *Laws of Ur-Namma* provide that if a man deflowers the virgin wife of a young man, the husband kills the wrongdoer.⁴⁸ This is not self-help, but rather the punishment that might be ordered by a court after a trial. If a man deflowers a virgin slave woman, the penalty is only five shekels. Because death and a five shekel punishment are not comparable, this comparison is noted in Table 1, but is not included in the statistical summary in Table 2.

The *Laws of Lipit-Ishtar* (ca. 1930 B.C.) are attributed to King Lipit-Ishtar (r. 1934-1924) of the First Dynasty of the city of Isin in southern Mesopotamia.⁴⁹ Sections d and f provide that if a man strikes a man's daughter so as to cause a miscarriage, the penalty is thirty shekels, while if he so strikes a man's slave woman, the penalty is only five shekels. Thus, if the free class is assumed to be 1, the ascribed value of the slave class is 5/30ths or 17% of the value ascribed to the free class.

TABLE 1
LAWS OF UR-NAMMA (ca. 2100 B.C.)
LAWS OF LIPIT-ISHTAR (ca. 1930 B.C.)
Mesopotamia

Laws	Section	Actor	Action	Victim	Penalty	Class Value
Ur-Namma	6	man	deflowers	virgin wife of young man	husband kills wrongdoer	
	8			virgin slave woman	5 shekels	
Lipit-Ishtar	d		strikes so as to cause a miscarriage	the daughter of a man	30 shekels	1
	f			slave woman of a man	5 shekels	0.167

GANIZATION OF POWER, ASPECTS OF BUREACRACY IN THE ANCIENT NEAR EAST 19-41 (1987); S.N. Kramer, *The Ur-Nammu Law Code: Who Was its Author?*, 52 ORIENTALIA NS 453 (1983).

48. *Laws of Ur-Namma* § 6.

49. ROTH, *supra* note 4, at 23; Westbrook, *supra* note 45, at 85.

TABLE 2
 ASCRIBED VALUES OF CLASSES
 LAWS OF LIPIT-ISHTAR (ca. 1930 B.C.)
 Sumer (Mesopotamia)

Class	Mean Value	N
Free	1	1
Slave	0.167	1

B. *The Laws of Eshnunna*

The Old Babylonian *Laws of Eshnunna* (ca. 1770 B.C.) come from the city of the same name in Mesopotamia. Often unattributed, these rules may have been promulgated by a ruler named Dadusha.⁵⁰ Written in Akkadian,⁵¹ they provide for different penalties for the owners of dogs or oxen who have been previously warned (an ancient version of the modern one-bite rule), depending upon the status of the victim. When a dog or an ox kills a free man, the penalty is forty shekels, while the penalty for killing a slave is only fifteen shekels. Thus, in Eshnunna slaves are given a higher explicit value (37.5%) than in Lipit-Ishtar (17%).

TABLE 3
 LAWS OF ESHNUNNA (ca. 1770 B.C.)
 Mesopotamia

Section	Actor	Action	Victim	Penalty	Value
23	man with no claim v. another man	takes in distress & causes death	slave woman	2 slave women	
24			wife or child of a commoner	capital pun	
54	ox owner warned	gores to death	man	40 shek	1
55			slave	15 shek	0.375
56	dog owner warned	bites & causes death	man	40 shek	1
57			slave	15 shek	0.375

50. ROTH, *supra* note 4, at 57.

51. Westbrook, *supra* note 45, at 85.

TABLE 4
 ASCRIBED VALUES OF CLASSES
 LAWS OF ESHNUNNA (ca. 1770 B.C.)
 Mesopotamia

Class	Mean Value	N
Freeman	1	2
Slave	0.375	2

C. *The Laws of Hammurabi*

The *Laws of Hammurabi* make up the most famous ancient code outside of the Bible. The collection was compiled near the end of Hammurabi's reign (r. 1792-1750 B.C.).⁵² Hammurabi, the sixth king in the First Dynasty of Babylon, expanded the empire and organized its complex government.⁵³ The Laws were copied many times over the succeeding centuries.⁵⁴

The social structure reflected in the *Laws of Hammurabi* is subject to much debate.⁵⁵ The three main classes are the *awilum*, the *muskenum*, and the *wardum* (slaves). Often *awilum* is used as the unmarked, indefinite subject to refer to simply a man or person.⁵⁶ At other times, it is contrasted with the *muskenum*, reflecting a class distinction in favor of the *awilum*. Although one might be tempted to assign the full free value to the *muskenum*, thus making the *awilum* a form of nobility, *awilum* in the *Laws of Hammurabi* and elsewhere is "usually a term referring to 'man,' 'person,' 'someone,' 'anyone,' etc."⁵⁷ Thus, here the class *awilum* is assigned the value of a free man with full rights, and the lower free class (*muskenum*) and the slave class take their values by contrast with the *awilum*.

52. ROTH, *supra* note 4, at 71.

53. *Id.*

54. See Roth, *supra* note 44.

55. See, e.g., EIN EDIKT DE KONIGS AMMI-SADUQA VON BABYLON (Fritz R. Kraus ed. & trans., 1958); YARON, *supra* note 44, at 132-62; Finkelstein, *supra* note 3; Josef Klima, *Im ewigen Banne der MUSKENUM-Problematik?*, 22 ACTA ANTIQUA ACADEMIAE SCIENTIARUM HUNGARICAE 267 (1974).

56. Occasionally, *muskenum* seems to be used in the same way. YARON, *supra* note 44, at 132-62.

57. ROTH, *supra* note 4, at 8.

TABLE 5
LAWS OF HAMMURABI (ca. 1750 B.C.)
Babylon

Section	Actor	Action	Victim	Penalty	Value
8	man	steal ox, sheep, donkey, pig, boat	belong to temple or palace	30 fold	1.333
8			belong to commoner	10 fold	0.444
116	man holding distress	beats distress to death	son of debtor	kill distrainor's son	
116			slave	20 shek + loan	
197	awilu	break the bone	awilu	break bone	
198			commoner	60 shek	
199			awilu's slave	half value	
198	awilu	blind the eye	commoner	60 shek	
196			awilu	blind the eye	
199			awilu's slave	half value	
200	awilu	knock out tooth	awilu	knock out own tooth	
201			commoner	20 shek	
202	awilu	strike the cheek	awilu with status higher than own	flogged in pub assembly with 60 stripes of an ox whip	
203			awilu with status equal	60 shek	1
204			commoner	10 shek	0.167
205	awilu's slave		awilu	cut off ear	
206-207	awilu	strike in a brawl unintentionally & victim dies	awilu	30 shek	1
208			commoner	20 shek	0.667
209	awilu	strike & cause to lose fetus	woman awilu	10 shek	1
211			woman commoner	5 shek	0.5
213			awilu's slave woman	2 shek	0.2

Table 5 continued

Section	Actor	Action	Victim	Penalty	Value
210	awilu	strike & kill	(pregnant) woman awilu	kill daughter	
212			(pregnant) woman commoner	30 shek	0.444
214			(pregnant) woman slave	20 shek	0.296
229	builder	constructs defective house, collapses & kills	householder	death to builder	
230			son of householder	kill son of builder	
231			slave of householder	give slave	

TABLE 6
 ASCRIBED VALUES OF CLASSES
 LAWS OF HAMMURABI (ca. 1750 B.C.)
 Babylon

Class	Mean Value	N
Awilu (free)	1.00	3
Commoner	0.44	5
Slave	0.25	2
Total		10

The provisions of Hammurabi show a wide range of interesting patterns. Most noteworthy, the class difference between the *awilum* and the *muskenum* over cheek-slapping is wider than the class difference for unintentional killing in a brawl.⁵⁸ The dignitary slight led to a wider class difference than death. This is both an interesting finding in itself and a reason to be cautious about generalizations. Another variable is clearly at work here, making the relative valuation of classes dependent on the nature of the crime.

58. Martha Roth's paper for this conference explores this issue in depth. See Roth, *supra* note 44.

D. Hittite Laws

The *Hittite Laws* are from Asia Minor in the 14th-13th century B.C. On their face, they are revisions of earlier laws. The Hittites figure prominently in modern discussions of law because they left an elaborate law collection, as well as a range of treaties. I used an unpublished 1963 translation by Harry A. Hoffner.⁵⁹ The valuation of slaves in the *Hittite Laws* was 38% of the value of free persons (both male and female).⁶⁰

TABLE 7
HITTITE LAWS
(ca. 1400 B.C.; revisions of earlier laws)
Central Anatolia (Turkey)

Section	Actor	Action	Victim	Penalty	Class Value	Gender Value (Controlling for Class)
1	anyone	kills in the course of an argument	woman	4 slaves	1	1
			man	4 slaves	1	1
2			slave	2 slaves	0.5	
3	anyone	accidentally kills	free man	2 slaves	1	1
			free woman	2 slaves	1	1
4			slave	1 slave	0.5	
7	anyone	blinds or knocks out tooth	free person	20 shek	1	
8			male slave	10 shek	0.5	1
			female slave	10 shek	0.5	1
11	anyone	breaks hand or foot	free man	20 shek	1	
12			male slave	10 shek	0.5	1
			female slave	10 shek	0.5	1
13	anyone	bites off nose	free person	40 shek	1	
14			male slave	3 shek	0.075	1
			female slave	3 shek	0.075	1
15	anyone	tears ear	free person	12 shek	1	
16			male slave	3 shek	0.25	1
			female slave	3 shek	0.25	1

59. Harry A. Hoffner, *The Laws of the Hittites* (1963) (unpublished Ph.D. thesis). A revised version of this translation will appear in ROTH, *supra* note 4. The most frequently used translation is an earlier one by Albrecht Goetze in *ANCIENT NEAR EASTERN TEXTS* (James B. Pritchard ed., 3d ed. 1969). My computations reflect the different shekel value given to the Hittite and Mesopotamian mina.

60. See GURNEY, *supra* note 28, at 70-72 (discussing valuation of slave class); E. NEUFELD, *THE HITTITE LAWS* 119-21 (1951) (discussing social classes).

Table 7 continued

Section	Actor	Action	Victim	Penalty	Class Value	Gender Value (Controlling for Class)
17	anyone	causes to miscarry	free woman	10 shek	1	
18			slave woman	5 shek	0.5	
24	he	at whose hearth a runaway slave is found	male slave	100 shek		1
			female slave	50 shek		0.5
176b	anyone	buys	craftsman (slave)	10 shek		
177	anyone		trained bird-handler (slave)	25 shek		
			unskilled man (slave)	20 shek		1
			unskilled woman (slave)	20 shek		1

TABLE 8
 ASCRIBED VALUES OF CLASSES
 HITTITE LAWS
 (ca. 1400 B.C.; revisions of earlier laws)
 Central Anatolia (Turkey)

Class	Mean Value	N
Free	1	7
Slave	0.377	11
Total		18

E. The Covenant Code (Torah)

As Raymond Westbrook has noted about the Covenant Code in *Exodus* 21-22, "It is impossible to date this code with any certainty, but it is one of the earliest strata of biblical literature, probably from the beginning of the first millennium or even the end of the second millennium [B.C.]." ⁶¹

61. Westbrook, *supra* note 45, at 74, 85.

TABLE 9
TORAH-COVENANT CODE
(*ca.* Early first millenium B.C.)
Israel

Section	Actor	Act	Victim	Punishment	Class Value	Gender Value (Controlling for Class)
Exodus 21.28-32	ox	gores to death	man	death to owner & ox stoned		1
			woman	death to owner & ox stoned		1
			minor, male	death to owner & ox stoned		1
			minor, female	death to owner & ox stoned		1
			slave, male	30 shek & ox stoned		1
			slave, female	30 shek & ox stoned		1

Bernard Jackson notes that one purpose of these sections may have been to raise the status of otherwise dependent classes—wives, sons, and daughters.⁶² For my purpose here, the noteworthy comparison is between the killing of a free person—male or female, son or daughter—and the killing of a slave. The death of a free person leads to death for both the goring ox and its owner, while the death of a slave costs only a dead ox and money—thirty shekels.

F. The Code of Gortyn

The great *Law Code of Gortyn* is the most extensive penal code surviving from ancient Grecian civilization,⁶³ though it is actually from one of the major cities of Crete. It probably dates from 480-450 B.C.,⁶⁴

62. See Bernard S. Jackson, *Modelling Biblical Law: The Covenant Code*, 70 CHI-KENT L. REV. 1745 (1995).

63. Much is known about Greek law because of historical and literary sources, fragments of codes, and city constitutions, but Gortyn left the most complete Code. See MICHAEL GAGARIN, *DRAGON AND EARLY ATHENIAN HOMICIDE LAW* (1981) (discussion of homicide law fragment); MICHAEL GAGARIN, *EARLY GREEK LAW* (1986) [hereinafter *EARLY GREEK LAW*] (describing a range of sources); DOUGLAS M. MACDOWELL, *ATHENIAN HOMICIDE LAW* (1963) (same); RONALD S. STROUD, *DRAGON'S LAW ON HOMICIDE* (1968) (same).

64. See *THE LAW CODE OF GORTYN*, *supra* note 28, at 8.

but is in part considerably older.⁶⁵ The social structure of Gortyn was complex and partly obscure.⁶⁶ At the top were the fully free men who associated in clans and took their meals in eating clubs—was Gortyn the Princeton of the eastern Mediterranean? Clubless or clanless men (*apetairoi*) were apparently free but without full rights. Serfs and slaves were at the bottom of the social structure.

TABLE 10
CODE OF GORTYN
(ca. 480-450 B.C.)
Crete

Section	Actor	Action	Victim	Penalty (s=stater)	Class Value	Gender Value (Controlling for Class)
1	whoever	leads away before trial	freeman	10s	1	
			slave	5s	0.5	
		does not release (before trial) when ordered by a judge	freeman	1s/day	1	
			slave	.5s/day	0.5	
	possessor	loses a suit and fails to release	freeman	50s+1s/day	1	
			slave	10s+.5s/day	0.2	
2	one	rape	freeman	100s	1	1
			freewoman	100s	1	1
			clubless man	10s	0.1	1
			clubless woman	10s	0.1	1
			male serf	2.5s	0.025	1
			female serf	2.5s	0.025	1
		rape	slavewoman belonging to the home	2s	0.02	

65. See *id.*; EARLY GREEK LAW, *supra* note 63, at 96.

66. See 1 KOCOUREK & WIGMORE, *supra* note 9, at 453-64; THE LAW CODE OF GORTYN, *supra* note 28, at 10-17; H.J. Roby, *The Twelve Tables of Gortyn*, 2 LAW Q. REV. 135 (1886); see also, I.M. Diakonoff, *Slaves, Helots and Serfs in Early Antiquity*, 22 ACTA ANTIQUA ACADEMIAE SCIENTIARUM HUNGARICAE 45 (1974).

Table 10 continued

Section	Actor	Action	Victim	Penalty (s=stater)	Class Value	Gender Value (Controlling for Class)
	slave	rape	freeman	200s	1	1
			freewoman	200s	1	
	male householder (slave)	rape	male serf	5s	0.025	1
			female serf	5s	0.025	1
	one	be taken in adultery	freewoman not in her family's houses	50s	1	
			woman of a clubless man	10s	0.2	
	slave	be taken (in adultery)	freewoman not in her family's houses	100s	1	
			slave	5s	0.05	
4	divorced woman	casts away a child before sending the child as provided by law	free child	50s	1	
			slave child	25s	0.5	

TABLE 11
 ASCRIBED VALUES OF CLASSES
 CODE OF GORTYN
 (ca. 480-450 B.C.)
 Crete

Class	Mean value	N
Free	1.000	8
Slave	0.295	6
Clubless Person	0.133	3
Serf	0.025	4
Total		21

Note that wrongs to slaves are valued higher than wrongs to serfs or clubless men. This seeming anomaly perhaps reflects who receives payment. Although serfs were tied to the land, they had possession of the houses in which they lived and their contents, could possess cattle

in their own right, and probably had money to pay fines.⁶⁷ If the prices paid for wrongs to clubless men are paid to the men themselves, while the prices paid for wrongs to slaves are paid to the slave owners, then a code written by slave owners for the benefit of slave owners would value wrongs to slaves higher. This is not unlike the situation in the original United States Constitution, where southern slave owners wanted a higher value for slaves than northerners since the southerners planned to appropriate the potential voting power of southern slaves. Once again, a confounding variable—who receives the payment—shows its strength.

G. *The Twelve Tables*

The first Roman code is the *Twelve Tables*,⁶⁸ traditionally dated at 451-450 B.C.⁶⁹ The origins of the law code have been widely debated, with some attributing it to a political move by the plebeians and Raymond Westbrook claiming Mesopotamian origins for the provisions.⁷⁰ It is more egalitarian than most ancient law collections, but one law provides that, if anyone knocks out the tooth of a freeman, the punishment is 300 asses, while the punishment for inflicting the same injury on a slave is half as much.

TABLE 12
TWELVE TABLES (ca. 450 B.C.)
Rome

Section	Actor	Act	Victim	Punishment	Value
Table VII, Law X	anyone	knocks out tooth	freeman	300 asses	1
			slave	150 asses	0.5

67. See THE LAW CODE OF GORTYN, *supra* note 28, at 14-15 (discussing differences between slaves and serfs and the rights of serfs).

68. 1 KOCOUREK & WIGMORE, *supra* note 9, at 465-68 (old partial translation).

69. See ALAN WATSON, ROMAN SLAVE LAW 151 (1987); see *id.* at 24-27, 68-77 (discussing *Twelve Tables*).

70. Westbrook, *supra* note 45.

TABLE 13
 ASCRIBED VALUES OF CLASSES
 TWELVE TABLES (*ca.* 450 B.C.)
 Rome

Class	Value	N
Free	1	1
Slave	0.5	1
Total		2

H. The Laws of Manu

The *Laws of Manu* are usually dated about 200 years on either side of the beginning of the Common Era.⁷¹ The Hindu caste system that has continued into modern times⁷² is set out in a rudimentary form in the *Laws of Manu*. Although the laws are mostly religious, there are many sections on wrongs of various kinds. In the provisions on sex with women of different classes, there are different punishments depending on the social class of the victim. But the pattern revealed in Tables 14 & 15 shows that it is not the class of the victim that matters. Rather, the *Laws of Manu* are concerned with the pollution of the wrongdoer. Thus, Table 15 reveals a pattern for punishing wrongs against different social classes that is directly opposite to that expected—sex with the lower classes is punished *more severely* than sex with the upper classes.

71. THE LAWS OF MANU (Wendy Doniger & Brian K. Smith trans., 1991).

72. See, e.g., LOUIS DUMONT, HOMO HIERARCHICUS: AN ESSAY ON THE CASTE SYSTEM (1966) (a careful, one might even say sympathetic, description of the Hindu caste system).

TABLE 14
LAWS OF MANU
(ca. 100 B.C.)
India

Section	Actor	Victim	Penalty (p=pennies)	Class Value	Punishment Value by Difference of Class
385	priest	unguarded woman of the ruling class	500p	1.0	
385	priest	unguarded woman of the commoner class	500p	1.0	
385	priest	woman of the servant class	500p	1.0	
385	priest	woman of the lowest castes (untouchables)	1000p	2.0	
378	priest	guarded woman of the priestly class	500p	0.5	1.0
383	priest	guarded woman of the ruling class	1000p	1.0	2.0
383	priest	guarded woman of the commoner class	1000p	1.0	2.0
376	ruler	unguarded woman of the priestly class	1000p	1.0	2.0
384	ruler	unguarded woman of the ruling class	head shaved with urine or 500p	0.5	1.0
382	ruler	woman of the commoner class	1000p	1.0	2.0
383	ruler	woman of the servant class	1000p	1.0	2.0
377	ruler	guarded woman of the priestly class	punished like servants or burnt up in a grass fire		
382	ruler	(guarded) woman of the commoner class	1000p		
376	commoner	unguarded woman of the priestly class	500p	0.5	1.0
384	commoner	unguarded woman of the ruling class	500p	0.5	1.0
383	commoner	woman of the servant class	1000p	1.0	2.0
377	commoner	guarded woman of the priestly class	punished like servants or burnt up in a grass fire		
382	commoner	guarded woman of the ruling class	500p		

TABLE 15
 ASCRIBED VALUES OF CLASSES
 LAWS OF MANU (ca. 100 B.C.)
 India

Note: Class Orders are Reversed from Traditional Order

Class	Av. Value	N
5. Lowest Castes	2.00	1
4. Servant	1.00	3
3. Commoner	1.00	3
2. Ruler	0.75	4
1. Priest	0.67	3
Total		14

As Table 16 reveals, the coherent way of understanding the sex provisions of the *Laws of Manu* is to see them as assessing punishments by whether the wrongdoer has sex with someone of a class higher than, equal to, or lower than the wrongdoer. Illegal sex with members of one's own class is the least serious; sex with an upper-class woman is a more serious wrong; and sex with a lower-class woman is the most serious sex offense.

TABLE 16
 PUNISHMENT VALUES FOR SEX WITH DIFFERENT CLASSES
 LAWS OF MANU (ca. 100 B.C.)
 India

Sex With Different Classes	Av. Value of Punishment	N
Sex With Lower Class	2.00	5
Sex With Higher Class	1.33	3
Sex With Same Class	1.00	2
Total		10

Because the *Laws of Manu* are based on a different organizing principle than the other laws, they are excluded from the final totals at the end of this Article.

I. The Burgundian Laws

The Burgundians, one of the many Germanic tribes that conquered parts of the former Roman Empire, settled in southeast Gaul. King Gundobad promulgated the *Lex Gundobada* in Latin about A.D. 483.⁷³ Additions made through about A.D. 532 are included in Table 17. Like many of the Germanic codes, the laws were written in Latin. Although a subject of long dispute, most commentators believe that the Germanic codes are made up of a large dose of traditional Germanic customary law, mixed with Roman-influenced law.⁷⁴ The closer the proximity to Rome, the greater the supposed influence of Roman law.

The *Burgundian Laws* are based on the traditional Germanic *wergeld*.⁷⁵ The *wergeld* is often not clearly laid out, rather it can be inferred from other provisions that base their penalties on the *wergeld*. As in other law collections, coding was a problem. Sometimes the Burgundians lumped the free classes together; at other times, they split them into the lower, middle, and upper free classes.

TABLE 17
BURGUNDIAN LAWS
Lex Gundobada (ca. A.D. 483-532)
Southeast Gaul

Section	Actor	Act	Victim	Punishment (s=solidi)	Value
p19-20n4		wergeld	ordinary slave	30s	
p19-20n5		wergeld	slave, Roman or barbarian, ploughman or swineherd	30s	
p19-20n6		wergeld	slave carpenter	40s	
p19-20n7		wergeld	slave blacksmith	50s	
p19-20n8		wergeld	slave silversmith	100s	
p19-20n9		wergeld	slave goldsmith	200s	
p19-20n10		wergeld	trained house servant or messenger (barbarian) (unfree)	60s	

73. THE BURGUNDIAN CODE (Katherine Fischer trans., 1949).

74. *Id.*

75. *Id.*

Table 17 continued

Section	Actor	Act	Victim	Punishment (s=solidi)	Value
p19-20n11		wergeld	royal agent (steward) (unfree)	150s	
p19-20n12		wergeld	private person's agent (steward) (unfree)	100s	
II, 2	anyone	kills after being the victim of violence (i.e., manslaughter)	anyone	half wergeld	
			nobility	150s	2
			middle class	100s	1.333
			lower class	75s	1
V,1	anyone	strikes with such presumption (V is titled "Of Those Who Strike Others With Lash or Rod, With a Kick, or With a Blow of the Fist")	native freeman	1s/blow & 6s fine	1
V,2	whoever	strikes	another's freedman	.5s/blow & 4s fine	0.643
V,3			another's slave	.333s/blow & 3s fine	0.476
V,6	slave	strikes with a blow of his fist	native freeman	100 blows	
V,4	anyone	seizes hair violently with two hands	native freeman	4s & 6s fine	1
V,5	whoever		freedman	.5s/blow & 4s fine	0.45
			another's slave	.333s/blow & 3s fine	0.333
V,4	anyone	seizes hair violently with one hand	native freeman	2s & 6s fine	1
V,5	whoever		freedman	.5s/blow & 4s fine	0.563
			another's slave	.333s/blow & 3s fine	0.417
X,1	anyone	kills	slave, Roman or barbarian, ploughman or swineherd	30s	0.2
X,1			trained house servant or messenger (barbarian) (unfree)	60s & 12s fine	0.48
X,5			slave carpenter	40s	0.267
X,4			slave blacksmith	50s	0.333

Table 17 continued

Section	Actor	Act	Victim	Punishment (s=solidi)	Value
X,3			slave silversmith	100s	0.667
X,2			slave goldsmith	200s	1.333
II,2		wergeld (implicitly)	freeman (lower class)	150s	1
II,2		wergeld (implicitly)	freeman (middle class)	200s	1.333
II,2		wergeld (implicitly)	freeman (nobility)	300s	2
L,1	native free Burgundian or Roman	unnecessarily killed	an agent (steward) of another's property	150s	
L,2			an agent (steward) of royal property		
XXVI,1	anyone	by chance strikes out the teeth	Burgundian of the highest class or Roman noble	15s	3
XXVI,2			middle class freeborn people (Burgundian or Roman)	10s	2
XXVI,3			persons of the lowest class	5s	1
XXVI,5	native freeman	strikes out the tooth	freedman	3s	0.6
XXVI,6			another's slave	2s	0.4
XXXII,1	native freeman	binds	an innocent native freeman	12s & 12s fine	1
XXXII,2			freedman	6s & 6s fine	0.5
XXXII,3			slave	3s & 3s fine	0.25
XXXIII,1	native freeman	cuts off hair & humiliates without cause	native freewoman	12s & 12s fine	1
XXXIII,2			freedwoman	6s [& 6s fine?]	0.5
XXXIII,3			maidservant	3s & 3s fine	0.25
XXXIII,4	slave	cuts off hair & humiliates without cause	native freewoman	200 blows	1
XXXIII,4			freedwoman	100 blows	0.5

Table 17 continued

Section	Actor	Act	Victim	Punishment (s=solidi)	Value
XXXIII,4			maidservant	75 blows	0.375
XCII,1	native freeman	cut off her hair in her courtyard	native freewoman	30s to the woman & 12s fine	1
XCII,3			maidservant	6s to the servant & 2s fine	0.190

TABLE 18
 ASCRIBED VALUES OF CLASSES
 BURGUNDIAN LAWS
 Lex Gundobada (ca. A.D. 483-532)
 Southeast Gaul

Class	Mean Value	N
Free Nobility	2.333	3
Free Middle Class	1.556	3
Free and Free Lower Class	1	10
Freed	0.536	7
Slave	0.352	9
Total		32

In the *Burgundian Laws*, slaves were valued at 35% of free, and freed slaves were valued at 54% of free. The upper-class free were valued at 2.3 times the value of the ordinary free class. Note, however, that the *wergeld* for a slave goldsmith was 200 *solidi*—equal to a middle-class free person and above a lower-class free person (150 *solidi*).

J. Laws of the Franks

In Gaul, the Germanic King Clovis consolidated the Salian and the Ripuarian Franks into a single kingdom.⁷⁶ He then issued a code of laws for the combined kingdom in about A.D. 507-511, usually called the *Pactus Legis Salicae* (Pact of Salic Law).⁷⁷ This Pact was

76. See THE LAWS OF THE SALIAN FRANKS 4-9 (Katherine F. Drew trans., 1991); LAWS OF THE SALIAN AND RIPUARIAN FRANKS, *supra* note 9, at 2-3.

77. LAWS OF THE SALIAN AND RIPUARIAN FRANKS, *supra* note 9, at 3.

originally set out in Latin in sixty-five titles. My analysis is based on this earliest version of the code, without later Christian revisions and additions.

TABLE 19
LAWS OF THE FRANKS
Pactus Legis Salicae (*ca.* A.D. 507-511)
Gaul

Section	Actor	Action	Victim	Penalty (d=denarii)	Class Value	Gender Value
X,1	he	steals	male slave	1400d + return/ value + time use	0.175	1.000
X,1	he	steals	female slave	1400d + return/ value + time use	0.175	1.000
X,4	he		female slave	1200d + return/ value + time use	0.150	0.857
X,6	he	loses (steals and sells)	female slave worth 15 or 25s	2800d + return/ value + time use	0.350	
			swineherd worth 25s	2800d + return/ value + time use	0.350	
			vine dresser worth 25s	2800d + return/ value + time use	0.350	
			metal worker worth 25s	2800d + return/ value + time use	0.350	
			millor worth 25s	2800d + return/ value + time use	0.350	
			carpenter worth 25s	2800d + return/ value + time use	0.350	
			groom worth 25s	2800d + return/ value + time use	0.350	
X,7	he	steals	young male household slave	1400d + return/ value + time use?	0.175	1.000

Table 19 continued

Section	Actor	Action	Victim	Penalty (d=denarii)	Class Value	Gender Value
X,7	he		young female household slave	1400d + return/ value + time use?	0.175	1.000
X,3	he	steals or kills or sets free	male slave	1400d + return/ value + time use	0.175	
XXXV,9	he	steals or kills	male household slave	3,000d + return/ value + time use	0.375	1.000
			female household slave	3,000d + return/ value + time use	0.375	1.000
			ironsmith	3,000d + return/ value + time use	0.375	
			goldsmith	3,000d + return/ value + time use	0.375	
			swineherd	3,000d + return/ value + time use	0.375	
			vintner	3,000d + return/ value + time use	0.375	
			stablehand	3,000d + return/ value + time use	0.375	
XXIV,1	he	kills	free boy ≤ 12	24,000d	3.000	1.000
XXIV,4			long-haired boy	24,000d	3.000	1.000
XLI,18			long-haired boy	24,000d	3.000	1.000
LXVe,2			girl ≤ 12	8,000d	1.000	0.333
XLI,15			free girl before she is able to bear children	8,000d	1.000	0.333
XXIV,6			(female) infant in mother's womb or new- born baby	4,000d	0.500	0.375
XXIV,6			(male) infant in mother's womb or new- born baby	4,000d	0.500	0.375
LXVe,1			boy fetus	24,000d	3.000	2.250
XLI,20			(female) infant in womb or newborn	4,000d	0.500	0.375
XLI,20			(male) infant in womb or newborn	4,000d	0.500	0.375

Table 19 continued

Section	Actor	Action	Victim	Penalty (d=denarii)	Class Value	Gender Value
XXIV,8			free woman after she has begun to bear children	24,000d	3.000	3.000
XLI,16			free woman after she begins to bear children	24,000d	3.000	3.000
LXVe,3			woman <60 able to bear children	24,000d	3.000	3.000
LXVe,1			pregnant woman	24,000d	3.000	3.000
XLI,19			pregnant woman	24,000d	3.000	3.000
XXIV,9			free woman after she is no longer able to bear children	8,000d	1.000	1.000
LXVe,4			woman after she is no longer able to bear children	8,000d	1.000	1.000
XLI,1			free Frank or other barbarian living by Salic law	8,000d	1.000	1.000
XLI,5			man in the king's trust	24,000d	3.000	
XLI,8			Roman who is a table com- panion of the king	12,000d	1.500	
XLI,9			Roman land- owner who is not a table companion of the king	4000d	0.500	
XLI,10			Roman who pays tribute	2500d	0.313	
LIV,1			count	24,000d	3.000	
LIV,2			sagibaron or count who is a servant of the king	12,000d	1.500	
LIV,3			sagibaron who is a freeman	24,000d	3.000	
XIV,1	he	robs by waylaying	freeman	2500d	1.000	
XIV,2	Roman		Salic barbarian	ordeal of boil- ing water or 2500d		
XIV,3	Frank	robs	Roman	1200d	0.480	
XXXV,5	freeman	robs	another man's half-free man	1400d + return of prop + time lost	0.560	

Table 19 continued

Section	Actor	Action	Victim	Penalty (d=denarii)	Class Value	Gender Value
XXXV,2		attacks & robs	another man's slave + took >40d	1200d + return of prop + time lost	0.480	
XXXV,3			another man's slave + took <40d	600d + return of prop + time lost	0.240	
XLI,2		throws in a well	free Frank or other barbarian living by Salic law	24,000d	1.000	
XLI,6			man in the king's trust	72,000d	3.000	
XXIV,2	he	cuts the hair	long-haired free boy	1800d		1.000
XXIV,3			free girl	1800d		1.000
XXV,1	freeman	has inter- course	someone else's slave girl	600s	1.000	
XXV,2			King's slave girl	1200s	2.000	
XXXI,1	he	blocks the road or strikes	freeman	600d	1.000	1.000
XXXI,2			free woman	1800d	3.000	3.000
XXXII,1	he	ties up without cause	freeman	1200d	1.000	
XXXII,3	Roman		Frank	1200d		
XXXII,4	Frank		Roman	600d	0.500	
LXIV,1	he	calls a sorcerer	another man	2500d		1.000
LXIV,2		calls a witch	free woman	7500d		3.000
LXVf,1	he	kills and pays what law provides	man	30s for time lost	1.000	
LXVf,2			servant	15s for time lost	0.500	
LXVf,2			freedman	15s for time lost	0.500	

TABLE 20
 ASCRIBED VALUES OF CLASSES
 LAWS OF THE FRANKS
 Pactus Legis Salicae (ca. A.D. 507-511)
 Gaul

Class	Av. Value	N
Nobility	3.000	4
Free	1.000	5
Half-Free	0.560	1
Freed Slaves	0.500	1
Roman	0.448	4
Slaves	0.272	11
Total		25

More clearly than other Germanic codes, the Salian Frankish laws assigned a specific and quite low valuation on Romans.⁷⁸ Their

78. In societies where being part of a family or clan is an important part of survival and foreigners are treated as lower-class citizens, exile or a loss of citizenship is a significant punishment. In both Germanic and ancient Near Eastern societies, "The kin group was important because the individual alone, or even with his immediate family, was in a precarious position . . ." THE LAWS OF THE SALIAN FRANKS, *supra* note 76, at 40 (statement by Katherine Fischer Drew). Westbrook, *supra* note 38, at 1639, uses similar language to describe the ancient Near East: "Foreigners in the ancient Near East were in a precarious situation. They had no legal rights outside of their own country or ethnic group unless they fell under the local rulers' protection." First, the hardships of shelter, protection from enemies, and food meant that pooling resources could reduce the chance of starvation and other causes of death. But legally, a kin group was crucial as well. One needed a kin group to bring suits and to pay damages. In many systems, such as Frankish law, offenses could be defended or prosecuted procedurally only by having large numbers of oathhelpers to testify in court. THE LAWS OF THE SALIAN FRANKS, *supra* note 76, at 40.

The *Laws of Hammurabi* (Mesopotamia, ca. 1750 B.C.) provide for banishment from the city for incest with a daughter. ROTH, *supra* note 4, at 110 (§ 154). The brief surviving excerpt from an Athenian law collection, *Drakon's Law of Homicide* (Athens, ca. 409-408 B.C. inscription of laws attributed to 621-620 B.C.), provides, "Even if someone kills someone without premeditation, he shall be exiled." STROUD, *supra* note 63, at 6. The Welsh *Laws of Hywel DDA* (Wales, ca. 928-1200) provide for banishment for an accessory to theft who is unable to pay the fine, though the lord who banishes the wrongdoer may settle for a token payment. THE LAW OF HYWEL DDA, *supra* note 9, at 157-59.

The Spartans sometimes revoked citizenship for wrongdoers. DOUGLAS M. MACDOWELL, SPARTAN LAW 148-49 (1986). The Athenians sometimes imposed perpetual exile for homicide. MACDOWELL, *supra* note 63, at 110 (quoting Demosthenes), 113. The Chinese criminal code, the *T'ang Code* (A.D. 653), has elaborate provisions on exile. Exile for life could be at three distances, depending on the intended seriousness of the punishment. THE T'ANG CODE: VOLUME 1, GENERAL PRINCIPLES, *supra* note 6. All three distances required a year of labor, but three years of labor could also be ordered. Johnson, *supra* note 6, at 220 n.24. Further, exile could be redeemed by the payment of 120-130 pounds of copper. *Id.*

value was only 45% of the value of free Franks. Slaves, however, were valued at only 27% of free persons.

K. Alamannic Laws

The first redaction of the Alamannic laws was the *Pactus Legis Alamannorum* (Pact of Alamannic Law) promulgated during the reign of Chlotar II (r. A.D. 584-629). The Alamans lived in the middle and upper Rhine and were allied with the Franks. Again, the original text was in Latin.

TABLE 21
ALAMANNIC LAWS
Pactus Legis Alamannorum (ca. A.D. 584-629)
Middle and Upper Rhine
(France and Germany)

Section	Actor	Action	Victim	Penalty (s=solidi)	Value	Class Value (Controlling for Gender)	Gender Value (Controlling for Class)
II	anyone	strikes	freewoman	2s	2.00	1.00	2
			freedwoman	1.333s	1.33	0.67	
			maidservant	1s	1.00	0.50	2
			man	1s	1.00	1.00	1
			slave (male)	.5s	0.50	0.50	1
XIV	anyone	accuses of witchcraft or poisoning & puts her in a hurdle	freewoman	80s	1.00	1.00	
			maidservant	15s	0.19	0.19	
	anyone	accuses of witchcraft or poisoning & not put in a hurdle, but seized & tor- tured	freewoman	40s	1.00	1.00	
			maidservant	15s	0.38	0.38	
XIV	man	kill a sup- posed witch	lower class woman	320s	1.00	1.00	
			middle class woman	400s	1.25	1.25	
			Alaman woman of the upper class	480s	1.50	1.50	

Table 21 continued

Section	Actor	Action	Victim	Penalty (s=solidi)	Value	Class Value (Controlling for Gender)	Gender Value (Controlling for Class)
XVII	freeman	kills	freeman	40s	1.00	1.00	1
			freedman	13.333s	0.33	0.33	1.000
			slave	12s	0.30	0.30	1
			free Alamannic woman	80s	2.00	1.00	2
			freedwoman	26.667s	0.67	0.33	2.000
			maidservant	12s	0.30	0.15	1
XVIII	waylayers	blocks the way (or waylays)	freeman	6s	1.00	1.00	1
			freedman	4s	0.67	0.67	1.000
			slave	3s	0.50	0.50	1
			free Alamannic woman	12s	2.00	1.00	2
			freedwoman	8s	1.33	0.67	2.000
			maidservant	4s	0.67	0.33	1.333
XXXI	anyone	injures	child of a person of the lower class	1s	1.00	1.00	
			child of a person of the middle class	6s	6.00	6.00	
			child of a person of the highest class	12s	12.00	12.00	

The *Alamannic Laws* show a wide difference between the prices for wrongs to different classes. Higher class free persons were valued at 6.75 times the value of the basic free class, while slaves were valued at 36% of free persons. Freed slaves were valued at only 53% of the value of free persons, closer to slavery than to freedom.

TABLE 22
 ASCRIBED VALUES OF CLASSES
 ALAMANNIC LAWS
 Pactus Legis Alamannorum
 (ca. A.D. 584-629)
 Middle and Upper Rhine
 (France and Germany)

Class	Mean Value (Controlling for Gender)	N
Higher Class Free	6.750	2
Middle Class Free	3.625	2
Free & Lower Class Free	1.000	10
Freed	0.533	5
Slave	0.356	8
Total		27

L. The Lombard Laws

The *Lombard Laws* were promulgated by King Rothair in A.D. 643 in a code usually called *Rothair's Edict*.⁷⁹ The Lombards had moved from central Europe at the end of the fifth century to Italy in 568 under the leadership of Alboin, replacing the Byzantines.⁸⁰ By 584, most of Italy had been conquered. Rothair, Duke of Brescia, promulgated his code in A.D. 643.⁸¹ Like almost all of the Germanic codes, the *Lombard Laws* were written in Latin.

The *Lombard Laws* have the most extensive price schedule of any of the codes examined in this Article. This code breaks down the loss of each finger and each toe, with different prices for a free man, an *aldius* (half-free man), a household slave, and a free slave.

79. See THE LOMBARD LAWS, *supra* note 27, at 14-17.

80. *Id.*

81. *Id.*

TABLE 23
LOMBARD LAWS
Rothair's Edict (A.D. 643)
Italy

Section	Actor	Act	Victim	Punishment (s=solidi; AC=as composition)	Class Value (Control- ling for Gender)	Gender Value (Control- ling for Class)
26	anyone	places himself in the road before victim, or inflicts some injury upon her	free woman	900s AC (as com- position) (half to King, half to vic- tim or victim's guardian)	1.000	45.000
26	anyone	places himself in the road before victim, or inflicts some injury upon her	free girl	900s AC (half to King, half to vic- tim or victim's guardian)		
26		blocks the road, and causes injury	freeman	20s AC + com- pensation for injuries by sched- ule RE 43-128		
27		blocks the road, provided no physical injury	freeman	20s AC	1.000	1.000
28	anyone	blocks the road to victim	man slave	20s AC to lord	1.000	1.000
28	anyone	blocks the road to victim	woman slave	20s AC to lord	0.022	1.000
28			freedman	20s AC to lord	1.000	
47	he who	hits on the head so that bones are broken	another man	12s AC-one bone; 24-2 bones; 36s- 3+ bones	1.000	
79		strikes on the head so that one or more bones are broken	aldius	4s AC + work lost + DRs fee	0.333	
79		household slave	4s AC + work lost + DRs fee		0.333	
103		strikes on the head so that bone is broken	field slave	(3s AC-1+ blows) + work lost + DRs fee (possibly plus 1s for 1 blow & 2s for 2+ blows	0.250	
48	someone	gouges out V's eye	another man	half wergeld AC		
81	he who		aldius	half the sum(pretium) at which valued had he been killed		
81			household slave	half the sum(pretium) at which valued had he been killed		

Table 23 continued

Section	Actor	Act	Victim	Punishment (s=solidi; AC=as composition)	Class Value (Control- ling for Gender)	Gender Value (Control- ling for Class)
105			field slave	half the sum(pretium) at which valued had he been killed		
49	he who	cuts off nose	another man	half wergeld AC		
82			aldius	8s AC + work lost + DRs fee	0.361	
82			household slave	8s AC + work lost + DRs fee	0.361	
106			field slave	4s AC + work lost + DRs fee	0.181	
50	he who	cuts off lip	another man	16s AC; w teeth exposed 20s AC	1.000	
84		cuts off lip so that teeth exposed	aldius	4s AC + work lost + DRs fee	0.200	
84			household slave	4s AC + work lost + DRs fee	0.200	
108			field slave	3s AC	0.150	
51	he who	knock's out front tooth	another man	16s AC / tooth	1.000	
85			aldius	4s AC / tooth	0.250	
85			household slave	4s AC / tooth	0.250	
109			field slave	2s AC / tooth	0.125	
52	he who	knock's out molars	implicitly: another man's	8s AC / tooth	1.000	
86			aldius	2s AC / tooth	0.250	
86			household slave	2s AC / tooth	0.250	
109			field slave	1s AC / tooth	0.125	
53	he who	cuts off ear	another man	1/4th wergeld		
83			aldius	2s AC + work lost + DRs fee	0.361	
83			household slave	2s AC + work lost + DRs fee	0.361	
107			field slave	2s AC + work lost + DRs fee	0.361	
54	he who	strikes & wounds face	another man	16s AC	1.000	
80		strikes on face	aldius	2s AC	0.125	
80			household slave	2s AC	0.125	
104			wounds on face	field slave	1s AC	0.063

Table 23 continued

Section	Actor	Act	Victim	Punishment (s=solidi; AC=as composition)	Class Value (Control- ling for Gender)	Gender Value (Control- ling for Class)
62	he who	cuts off hand	another man	1/2 wergeld AC		
88			al dius	half the value (pretium) AC		
88		household slave	half the value (pretium) AC			
113			field slave	half the value (pretium) AC		
63	he who	cuts off thumb	another man	1/6 wergeld AC		
89			al dius	8s AC + work lost + DRs fee	0.361	
89			household slave	8s AC + work lost + DRs fee	0.361	
114			field slave	4s AC	0.181	
64	he who	cuts off index finger	another man	16s AC	1.000	
90			al dius	6s AC	0.375	
90			household slave	6s AC	0.375	
115			field slave	3s AC	0.188	
65	he who	cuts off middle finger	another man	5s AC	1.000	
91			al dius	2s AC	0.400	
91			household slave	2s AC	0.400	
116			field slave	1s AC	0.200	
66	he who	cuts off ring fin- ger	another man	8s AC	1.000	
92			al dius	2s AC	0.250	
92			household slave	2s AC	0.250	
117			field slave	1s AC	0.125	
67	he who	cuts off little fin- ger	another man	16s AC	1.000	
93			al dius	4s AC	0.250	

Table 23 continued

Section	Actor	Act	Victim	Punishment (s=solidi; AC=as composition)	Class Value (Control- ling for Gender)	Gender Value (Control- ling for Class)
93			household slave	4s AC	0.250	
118			field slave	2s AC + work lost + DRs fee		
68	he who	cuts off foot	another man	1/2 wergeld AC		
95			aldius	half the value (pretium) AC		
95			household slave	half the value (pretium) AC		
119			field slave	half the value (pretium) AC		
69	he who	cuts off big toe	another man	16s AC	1.000	
96			aldius	4s AC + work lost + DRs fee	0.381	
96			household slave	4s AC + work lost + DRs fee	0.381	
120			field slave	2s AC	0.125	
70	he who	cuts off 2d toe	another man	6s AC	1.000	
97			aldius	2s AC	0.333	
97			household slave	2s AC	0.333	
121			field slave	1s AC	0.167	
71	he who	cuts off 3d toe	another man	3s AC	1.000	
98			aldius	1s AC	0.333	
98			household slave	1s AC	0.333	
122			field slave	1s AC	0.333	
72	he who	cuts off 4th toe	another man	3s AC	1.000	
99			aldius	1s AC	0.333	
99			household slave	1s AC	0.333	
123			field slave	.5s AC	0.167	
73	he who	cuts off 5th toe	another man	2s AC	1.000	
100			aldius	1s AC	0.500	

Table 23 continued

Section	Actor	Act	Victim	Punishment (s=solidi; AC=as composition)	Class Value (Control- ling for Gender)	Gender Value (Control- ling for Class)
100			household slave	1s AC	0.500	
124			field slave	.5 AC	0.250	
87	he who	breaks arm	al dius	6s AC + work lost + DRs fee	0.361	
87			household slave	6s AC + work lost + DRs fee	0.361	
101	he who	wounds on the chest	al dius	6s AC + work lost + DRs fee	0.361	
101			household slave	6s AC + work lost + DRs fee	0.361	
111			field slave	3s AC + work lost + DRs fee	0.181	
102	he who	puncturing arm or leg	al dius	3s AC + work lost + DRs fee	0.361	
102			household slave	3s AC + work lost + DRs fee	0.361	
110			field slave	2s AC + work lost + DRs fee	0.241	
102	he who	strikes arm or leg without puncturing	al dius	1s AC (prob. + work lost + DRs fee)	0.361	
102			household slave	1s AC (prob. + work lost + DRs fee)	0.361	
110			field slave	1s AC + work lost + DRs fee	0.361	
87	he who	breaks arm	al dius	6s AC + work lost + DRs fee	0.723	
87			household slave	3s AC + work lost + DRs fee	0.361	
112			field slave	3s AC + work lost + DRs fee	0.361	
94	he who	breaks hip or shin bone	al dius	6s AC + work lost + DRs fee	0.723	
94			household slave	3s AC + work lost + DRs fee	0.361	
112	he who	breaks hip or leg	field slave	3s AC + work lost + DRs fee	0.361	
129	he who	kills	al dius	60s AC	0.381	
130			household slave (trained or taught)	50s AC	0.317	

Table 23 continued

Section	Actor	Act	Victim	Punishment (s=solids; AC=as composition)	Class Value (Control- ling for Gender)	Gender Value (Control- ling for Class)
131			household slave sub- ordinate to trained slave	25s AC	0.159	
132			tenant slave	20s AC	0.127	
133			slave ox plowman with his own house	20s AC	0.127	
134			field slave under a tenant slave	16s AC	0.102	
135			master swineherd [slave] with 2+ learners under him	50s AC	0.317	
135			swineherd [slave] less important	25s AC	0.159	
136			master goatherd, cat- tleherd, oxherd [slave] with a house	20s AC	0.127	
136			followers of master goatherd, cat- tleherd, or oxherd	16s AC	0.102	
201			girl (free?)	1200s AC		
201			free woman	1200s AC		
14	anyone (1 or 2 persons)	secretly kills	freeman	900s (combined)	1.000	
14			woman slave	900s (combined)		1.000
14			man slave	900s (combined)	1.000	1.000
14	anyone (more than 2)		native- born free- man	wergeld, accord- ing to his rank (each killer pay- ing total)		

Table 23 continued

Section	Actor	Act	Victim	Punishment (s=solidi; AC=as composition)	Class Value (Control- ling for Gender)	Gender Value (Control- ling for Class)
14			slave	composition according to value (each killer paying total)		
14			freedman	composition according to value (each killer paying total)		
205	he who	rapes	another man's aldia (born of a free mother)	40s AC	0.723	
206			freedwo- man	20s AC	0.361	
207			female slave	20s AC	0.361	
208	anyone	blocks way of owner or guard- ian retrieving stolen	aldius	40s AC (half to king, half to owner)	0.723	
209			woman slave	20s AC (half to king, half to owner)	0.361	
194	man	has intercourse	native woman slave	20s AC	0.361	
			Roman woman slave	12s AC	0.217	
383	anyone	in a quarrel drags by beard or hair	freeman	6s AC	1.000	
			slave	same as 1 blow (1s AC)	0.167	
			aldius	same as 1 blow (1s AC)	0.167	

TABLE 24
 ASCRIBED VALUES OF CLASSES
 THE LOMBARD LAWS
 (Controlling for Gender)
 Rothair's Edict
 (ca. A.D. 643)
 Italy

Class	Mean Value	N
Free	1.000	18
Freed Slave	0.681	2
Aldius (Half-Free)	0.381	27
Slave & House Slave	0.361	30
House Slave	0.329	23
Field Slave	0.214	21
Total		98

As in the antebellum American South, field slaves (21% of free) were of a lower class and value than house slaves (33% of free). The class of half-free persons (*aldius*) were little higher than slaves—38% to 36%. Freed slaves were valued at 68% of the value of free persons. This low valuation of freed slaves reflects the observation of historical sociologists that freed slaves were usually dependent classes, tied to their former masters.⁸²

M. The Visigothic Code

The Visigoths, who settled in Spain, may have been the first Germanic tribe to write a code of laws. The first code dates back to A.D. 476, but it survives only in the revised version promulgated about A.D. 654. Unlike most codes, the *Visigothic Code* valued the class of freed slaves even lower than the class of slaves. Slaves were valued at 47% of free persons, while freed slaves were valued at only 33% of free persons. Once again, this anomaly suggests that who actually collected payment for the wrong may have affected the price to be paid.

82. See PATTERSON, *supra* note 16, at 240-61.

TABLE 25
VISIGOTHIC CODE
Legis Visigothorum
(*ca.* A.D. 654, based on codes
back to A.D. 476)
Spain

Section	Actor	Action	Victim	Penalty (s=solidi)	Class Value	Gender Value (Controlling for Class)
Bk.VI,tit.III,s.4	anyone	cause, by blow or otherwise, to abort a fully formed fetus	freeborn woman	200s	1.33	
		cause, by blow or otherwise, to abort a fetus not fully formed	freeborn woman	100s	0.67	
Bk.VI,tit.III,s.4	freeborn man	produces abortion	female slave	20s	0.13	
Bk.VI,tit.IV,s.1	freeborn person	strikes on head & causes bruise	another freeborn person	5s	1.00	
			slave of another	2.5s	0.50	
Bk.VI,tit.IV,s.1	freeborn person	strikes on head & breaks skin	another freeborn person	10s	1.00	
			slave of another	5s	0.50	
Bk.VI,tit.IV,s.1	freeborn person	strikes on head & causes wound extending to the bone	another freeborn person	20s	1.00	
			slave of another	10s	0.50	
Bk.VI,tit.IV,s.1	freeborn person	strikes on head & breaks a bone	another freeborn person	100s	1.00	
			slave of another	50s	0.50	
Bk.VI,tit.IV,s.3	culprit	strikes and destroys the nose	freeman	100s	1.00	
	person born free		freedman	33.33s	0.33	
Bk.VI,tit.IV,s.3	(whoever)	injury to the loins	freeman	100s	1.00	
	person born free		freedman	33.33s	0.33	

Table 25 continued

Section	Actor	Action	Victim	Penalty (s=solidi)	Class Value	Gender Value (Control- ling for Class)
Bk.VI,tit.IV,s.3	whoever	cuts off or destroys the use of a hand	freeman	100s	1.00	
	person born free		freedman	33.33s	0.33	
Bk.VI,tit.IV,s.3	(whoever)	loss of thumb	freeman	50s	1.00	
	person born free		freedman	16.67s	0.33	
Bk.VI,tit.IV,s.3	(whoever)	loss of forefinger	freeman	40s	1.00	
	person born free		freedman	13.33s	0.33	
Bk.VI,tit.IV,s.3	(whoever)	loss of middle finger	freeman	30s	1.00	
	person born free		freedman	10s	0.33	
Bk.VI,tit.IV,s.3	(whoever)	loss of fourth finger	freeman	20s	1.00	
	person born free		freedman	6.67s	0.33	
Bk.VI,tit.IV,s.3	(whoever)	loss of fifth finger	freeman	10s	1.00	
	person born free		freedman	3.33s	0.33	
Bk.VI,tit.IV,s.3	(whoever)	loss of tooth by vio- lence	freeman	12s/tooth	1.00	
	person born free		freedman	4s/tooth	0.33	
Bk.VI,tit.IV,s.3	whoever	breaks the leg & renders lame	freeman	pound of gold	1.00	
	person born free		freedman	.33 pound of gold	0.33	
Bk.VI,tit.V,s.3	one man	push another with- out malice, causing the person pushed to kill a third party by accident	(freeman)	pound of gold	1.00	
Bk.VI,tit.V,s.9	freeman	kill by accident (as above)	slave	.5 pound of gold	0.50	
Bk.VII,tit.III,s.2	freeman	kidnap	male slave	100 lashes & 4 persons (slaves) of the same sex	1	
			female slave	100 lashes & 4 persons (slaves) of the same sex		1
Bk.VII,tit.III,s.3	anyone	kidnap	son of a freeborn person	delivered to family to be (at the family's option) killed, sold into slav- ery, or fined 300s		1

Table 25 continued

Section	Actor	Action	Victim	Penalty (s=solidi)	Class Value	Gender Value (Controlling for Class)
			daughter of a freeborn person	delivered to family to be (at the family's option) killed. sold into slav- ery, or fined 300s		1
Bk.V,tit.IV,s.11	anyone	sell or give away	male free- born person	100s of gold (or if can't pay it, 100 lashes and become slave of victim)		1
			female free- born person	100s of gold (or if can't pay it, 100 lashes and become slave of victim)		1
Bk.V,tit.IV,s.11	slave	sell or give away	male free- born person	200 lashes, scalping, and perpetual servi- tude		1
			female free- born person	201 lashes, scalping, and perpetual servi- tude		1
Bk.III,tit.III,s.8	slave	carries off by force	freewoman	scalped & 300 lashes	1.00	
Bk.III,tit.III,s.10		carries off by force	female slave of another	head shaved & 200 lashes	0.67	

TABLE 26
 ASCRIBED VALUES OF CLASSES
 VISIGOTHIC CODE
 Legis Visigothorum
 (ca. A.D. 654, based on codes back to A.D. 476)
 Spain

Class	Mean Value	N
Free	1.000	18
Slave	0.471	7
Freed	0.333	10
Total		35

Incredibly, S.P. Scott, the translator of the *Visigothic Code*, claims:

The Visigoths were different from other barbarians, in that, in legislation and the management of their civil affairs, they manifested a sense of humanity, and a genuine philosophy, rarely to be found even among nations that are thoroughly civilized. . . . Under their system all persons were equal before the law. . . . The punishment for crime was graded according to the wealth of the offender, rather than according to the rank and station of the party injured.⁸³

As to the humanity of the Visigoths, the pervasiveness of debt slavery and the vicious provisions against Jews tend to undercut Scott's conclusions. But his statement about the punishment of crime not being based on the rank of the victim is simply false, as Tables 25 and 26 amply illustrate.

N. *Early English Law Collections*

The early British law collections are perhaps the earliest surviving works written in Old English and the only early Germanic codes not written in Latin. The most extensive of the early law collections are the *Laws of Alfred* (ca. A.D. 885-899), but these date from after Charlemagne and are thus excluded from this Study. King Aethelberht of Kent in southern England probably promulgated his laws about A.D. 602-603.⁸⁴ A later, less detailed law collection was attributed to the Kentish kings Hlothhere and Eadric (ca. A.D. 673-86).⁸⁵

83. THE VISIGOTHIC CODE xix (S.P. Scott ed. & trans., 1910) (Scott goes on to discuss slaves in a way inconsistent with this statement, but discusses freed slaves without directly undercutting his incorrect generalizations).

84. See F.L. ATTENBOROUGH, THE LAWS OF THE EARLIEST ENGLISH KINGS 2-61 (1922); DOROTHY WHITLOCK, ENGLISH HISTORICAL DOCUMENTS 391-407 (2d ed. 1979). The versions of the early Kentish laws are preserved only in a much later 12th century manuscript. Some revisions and modernizations of language apparently occurred. ATTENBOROUGH, *supra*, at 3.

85. See ATTENBOROUGH, *supra* note 84, at 2-61; WHITLOCK, *supra* note 84, at 391-407.

TABLE 27
 LAWS OF AETHELBERHT (*ca.* A.D. 602-603)
 LAWS OF HLOTHHERE AND EADRIC (*ca.* A.D. 673-86)
 LAWS OF INE (*ca.* A.D. 688-694)
 Saxon Kingdoms in Southern England

Laws	Section	Actor	Action	Victim	Penalty (s=schilling)	Value	Gender Value (Controlling for Class)
Aethelberht	10	man	lies with	maiden (slave) belonging to the king	50s		
	11			maiden grinding slave belonging to the king	25s		
				maiden of the third class (slave) belonging to the king	12s		
	16	man	lies with	commoner's serv- ing maid	6s		
	11			slave of the 2d class	2.5s		
				maiden of the third class (slave)	1.5s		
	21	man	slays	another man	100s (ordinary wergeld)	1.000	
	25			dependent of a commoner	6s	0.060	
	26			laet of the best class	80s	0.800	
				laet of 2d class	60s	0.600	
				laet of 3d class	40s	0.400	
	12			fedesl belonging to the king,	20s	0.200	
	24	man	lays bonds	freeman	20s	1.000	
	88			another man's ser- vant	6s	0.300	
	74		[for injury]	unmarried woman	same as free- man		1
				freeman	same as unmar- ried woman		1

Table 27 continued

Laws	Section	Actor	Action	Victim	Penalty (s=schilling)	Value	Gender Value (Control- ling for Class)
	75		violation of the mund (guardian- ship, i.e., taking away)	widow of the best class, the nobility	50s		
				widow of the 2d class	20s		
				widow of the 3d class	12s		
				widow of the 4th class	6s		
Hlothhere & Eadric	1	man's servant	slays	nobleman with a wergeld of 300s	surrender the homicide and pay the value of 3 slaves	3.000	
	3			freeman with a wergeld of 100s	surrender the homicide and pay the value of 1 slave	1.000	
Ine	23 s.3	man	wergeld	welsh taxpayer	120s	2.000	
				son of a welsh tax- payer	100s	1.667	
	24 s.2			Welshman with 5 hides of land	600s	10.000	
	32			Welshman with a hide of land	120s	2.000	
				Welshman with half a hide of land	80s	1.333	
				Welshman with no land	60s	1.000	
				Welsh horseman in the King's service	200s	3.333	
			killing	slave	60s (or 50s)		
	45		breaking into forti- fied prem- ises	of the king or a bishop	1200s		
				of an ealdorman	80s		
				king's thegn	60s		
				nobleman who holds land	35s		

TABLE 28
 ASCRIBED VALUES OF CLASSES
 EARLY ENGLISH LAWS
 (ca. A.D. 602-694)
 Saxon Kingdoms in Southern England

Class	Mean value	N
Nobility	6.500	2
Free	1.000	3
Freed	0.600	3
Slave	0.300	1
Total		9

The relative differences in valuation within the slave class are huge, from 1.5 schillings for a man who lies with a third-class slave maiden to fifty schillings for doing the same to a maiden slave of the king. There are similar elaborate, wide differentiations for killing different persons from dependent classes (from six schillings to eighty schillings). For violating the guardianship of a widow, one again sees multiple classes (four classes of widow) and multiple punishments (from six schillings to fifty schillings).

In the *Laws of Ine* (ca. A.D. 688-694), from the West Saxon kingdom of Wessex, the *wergeld* of different classes of free Welsh landowners is laid out and contrasted with the *wergeld* of a free Welshman with no land. These laws are known because they were attached to the *Laws of Alfred*. Thus, the *Laws of Ine* were probably slightly revised and may not be complete.

Overall, in the early British law collections, slaves are valued at 30% of free, freed slaves at 60% of free, and the nobility at 6.5 times the value of the basic free class.

V. THE VALUES OF SOCIAL CLASSES

Ancient law systems explicitly treated wrongs against slaves as less serious than wrongs against free persons. Tables 29-31 tell the story. The range of slave values for the ordinary slave is surprisingly narrow—17% to 50%, with a mean of 33%. The outliers among systems are *Lipit-Ishtar* and the Roman *Twelve Tables*, which are based on only one observation each. Thus, if systems with only one observation were excluded, the range would be even narrower—25% to 47%.

TABLE 29
ASCRIBED VALUES OF CLASSES IN ANCIENT LAW
2100 B.C. - A.D. 700

Laws	Nobility		Free		Freed		Half-Free		Slave	
	Value	N	Value	N	Value	N	Value	N	Value	N
Romans			1	1					0.50	1
Visigoths			1	18	0.33	10			0.47	7
Hittites			1	7					0.38	11
Eshnunna			1	2					0.38	2
Alamans	6.75	2	1	10	0.53	5			0.36	8
Burgundians	2.33	3	1	10	0.54	7			0.35	9
Lombards			1	18	0.68	27	0.38	27	0.30	51
Saxons	6.50	2	1	3	0.60	3			0.30	1
Gortyn			1	8					0.29	10
Franks	3.00	4	1	5	0.50	1	0.56	1	0.27	11
Hammurabi			1	3					0.25	2
Lipit-Ishtar			1	1					0.17	1
Mean (unweighted)	4.65	11	1	86	0.53	28	0.47	28	0.33	114

TABLE 30
ASCRIBED VALUES OF SLAVES IN ANCIENT LAW
2100 B.C. - A.D. 700

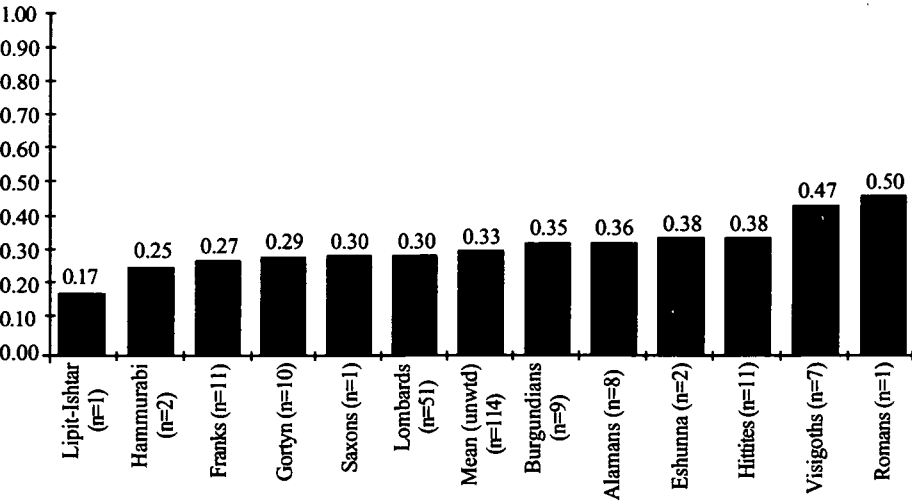
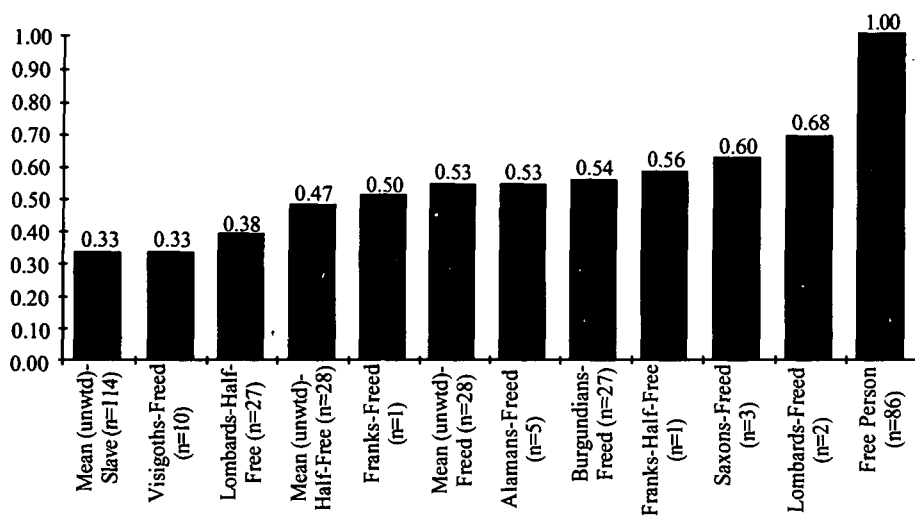


TABLE 31
 ASCRIBED VALUES OF FREED SLAVES AND HALF-FREE
 PERSONS IN ANCIENT LAW
 2100 B.C. - A.D. 700

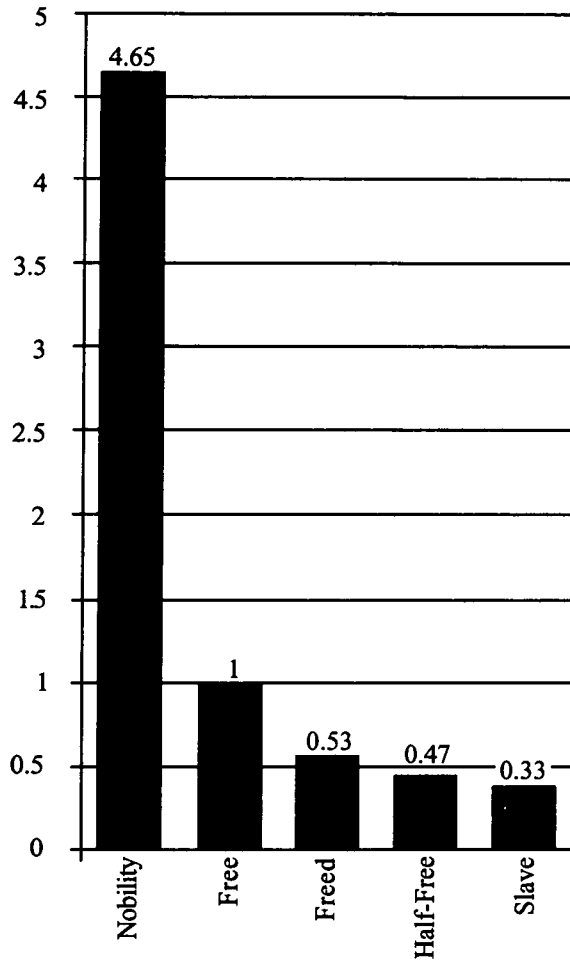


Consistent with the findings of historians of slavery,⁸⁶ the valuations of freed slaves and half-free persons are very low, barely above that of slaves. Freed slaves were typically dependent classes, expected to stay close to their former masters.⁸⁷ As Tables 29 and 31 show, the mean value of freed slaves was 53%, while the mean value of half-free persons was 47%.

86. See PATTERSON, *supra* note 16, at 240-61 (describing the degraded status, both socially and legally, of freed slaves across a wide variety of slave societies).

87. See *id.*

TABLE 32
RELATIVE VALUES OF CLASSES
IN ANCIENT LAW CODES AND COLLECTIONS
2100 B.C. - A.D. 700



As Tables 29 and 32 illustrate, the upper classes (excluding the king) are valued on average at 4.65 times the value of the ordinary free classes. This is uncannily similar to modern American views of the proper salary difference between low prestige jobs (e.g., unskilled

workers) and high prestige jobs (e.g., corporate C.E.O.s and cabinet officials).⁸⁸

VI. COMMODIFICATION—THE FIRST 3,000 YEARS

One of the standard complaints about capitalism is that it commodifies human beings. As Peggy Radin explains:

Universal noncommodification holds that the hegemony of profit-maximizing buying and selling stifles the individual and social potential of human beings through its organization of production, distribution, and consumption, and through its concomitant creation and maintenance of the person as a self-aggrandizing profit- and preference-maximizer. Anticommodifiers tend to assume that we are living under a regime of universal commodification, with its attendant full-blown market methodology and market rhetoric. They also tend to assume that universal commodification is a necessary concomitant of commodification in the narrower sense—the existence of market transactions under capitalism.

....

Ultimately, laboring to produce commodities turns the worker from a human being into a commodity, "indeed the most wretched of commodities." Marx continued:

The worker becomes an ever cheaper commodity the more commodities he creates. With the increasing value of the world of things proceeds in direct proportion the devaluation of the world of men. Labour produces not only commodities; it produces itself and the worker as a commodity—and does so in the proportion in which it produces commodities generally.⁸⁹

It is interesting to look at commodification in the ancient law systems, which are sometimes romanticized by Marxians as representations of a collectivist past.⁹⁰ Rather than showing a lack of commodification that one would expect in pre-capitalist states, these

88. Kelley & Evans, *supra* note 21. The ratio that Western Europeans think proper is slightly lower. Of course, the actual difference between salaries in the United States is much wider, at least 110 to one (\$1.1 million for professional baseball players and \$10,000 for unskilled service workers).

89. Margaret J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1871-72 (1987) (quoting Karl Marx, *Economic and Philosophic Manuscripts of 1844*, in THE MARX-ENGELS READER 70-71 (R. Tucker ed., 2d ed. 1984)).

90. Certainly, there were more collectivist systems than are present under capitalism, but private property was overwhelmingly the rule, not the exception. See PAOLO GROSSI, AN ALTERNATIVE TO PRIVATE PROPERTY (Lydia G. Cochrane trans., 1981); Robert C. Ellickson & Charles DiA. Thorland, *Ancient Land Law: Mesopotamia, Egypt, Israel*, 71 CHI.-KENT L. REV. 321 (1995); J.G. Manning, *Demotic Egyptian Instruments of Transfer as Evidence for Private Ownership of Real Property*, 71 CHI.-KENT L. REV. 237 (1995); J.N. Postgate, *Land Tenure in the Middle Assyrian Period: A Reconstruction*, 34 BULL. SCH. ORIENTAL & AFRICAN STUD. 496 (1971); Marvin A. Powell, *Elusive Eden: Private Property at the Dawn of History*, 46 J. CUNEIFORM STUD. 99 (1994); Johannes M. Renger, *Institutional, Communal, and Individual Ownership*

ancient law systems are marked by the reduction of people to their prices to a degree that looks almost incomprehensible to us. Ancient commodification, to be sure, was different in kind and extent than commodification under capitalism. Yet virtually all of the law collections, and especially the Germanic ones, set prices that appear to rep-

or Possession of Arable Land in Ancient Mesopotamia From the End of the Fourth to the End of the First Millennium B.C., 71 CHI.-KENT L. REV. 269 (1995).

Yet the extended family or the clan was much more commonly the basis for the social and legal organization of the society. For example, collective payment of fines by family members was common. Families were frequently required to bear liability for the wrongs of family members. See ZE'EV W. FALK, *HEBREW LAW IN BIBLICAL TIMES* 73 (1964); POSNER, *supra* note 22, at 193-96; David Daube, *Two Notes on Communal Responsibility*, 36 SOC. REV. 24 (1944); Saul Levmore, *Rethinking Group Responsibility and Strategic Threats in Biblical Texts and Modern Law*, 71 CHI.-KENT L. REV. 85 (1995).

The *Laws of the Hywel DDA* (Wales, ca. 928-1200) have a particularly elaborate scheme. Relatives pay 8/9ths of the penalty for murder, their contribution varying according to how closely related they are to the murderer. THE LAW OF HYWEL DDA, *supra* note 9, at 146-47; WELSH MEDIEVAL LAW 185 (A.W. Wade-Evans trans., 1909).

E. Neufeld argues that, "Joint responsibility or collective responsibility, common among the Semites and widespread all over the primitive world, was predominant among the Hittites." NEUFELD, *supra* note 60, at 116. For example, in the *Hittite Laws* (Asia Minor, ca. 1400 B.C.), the penalty for disobeying the king was the ruin of the house, that is, the "whole household and family." See GURNEY, *supra* note 28, at 93, 99 (discussing § 173 of the *Hittite Laws*).

Drew points out that in Frankish law, the family might pay, as well as receive compensation:

If a man by himself did not have sufficient property to pay the entire composition assessed against him, he could seek help from his closest kin, father and mother first, then brothers and sisters. If sufficient help was still not forthcoming, more distant members of the maternal and paternal kin (up to the . . . second cousins . . .) could be asked to help. This responsibility of the kin to aid their kinsmen is known in Frankish law as *chrenecruda* . . .

THE LAWS OF THE SALIAN FRANKS, *supra* note 76, at 40. The wife and her family were not liable to pay, nor were the husband's family liable for the wife's family's tort debts. *Id.*

The *T'ang Code* (China, ca. A.D. 653), punishes family members of persons who committed certain of the ten abominations, even if they had no knowledge of the wrong. THE T'ANG CODE: VOLUME 1, GENERAL PRINCIPLES, *supra* note 6, at 4. Likewise, public officials who worked with a corrupt official may be punished even when they had no knowledge of the wrong.

In one Neo-Assyrian document that Martha Roth analyzes, the murderer must give his own daughter to the son of the murder victim. Martha T. Roth, *Homicide in the Neo-Assyrian Period*, in LANGUAGE, LITERATURE, AND HISTORY 351 (67 AM. ORIENTAL SERIES) (Francesca Rochberg-Halton ed., 1987). In the *Laws of Hammurabi* (Mesopotamia, ca. 1750 B.C.), children can be put to death for the wrongs of their parents—and in the *Middle Assyrian Laws* (Mesopotamia, ca. 1076 B.C.), wives can be raped as payment for their husbands' raping a virgin. ROTH, *supra* note 4, at 174-75 (§ 55). The text ambiguously implies that the wife of the rapist stays with the victim's father. Westbrook provides a large number of ancient Mesopotamian and Biblical examples of wives, daughters, sons, and even sisters being given over into slavery in payment for delicts. See Westbrook, *supra* note 38, at 1643-45.

Sometimes entire cities were responsible for crimes if they could not catch the criminal. Martha Roth discusses a document from the Neo-Assyrian period in the form of a debt-note, binding the entire village to pay compensation to the kin of a murdered stranger if any kin should claim compensation. Roth, *supra*. In the *Laws of Hammurabi* (Mesopotamia, ca. 1750 B.C.), the city and the governor are responsible for stolen property if someone establishes a theft and no thief is caught. ROTH, *supra* note 4, at 85 (§ 23). O.R. Gurney argues that such city responsibility was found as well in medieval Islam, Deuteronomy, and Hittite law. GURNEY, *supra* note 28, at 97-98 (discussing *Deuteronomy*, XXI. 1-10 and the *Hittite Laws*, § IV).

resent the value of people.⁹¹ James Whitman has argued against the Weberian thesis that the state arose to monopolize violence, since this explanation does not fit easily with the emphasis of most early law collections on setting just prices.⁹²

Further, debt slavery was the common backstop when people or their families were unable to pay. A common ancient solution for the inability to pay high fines was slavery or servitude—either debt slavery until a debt was paid, perpetual chattel slavery, or debt servitude that approached slavery. Raymond Westbrook attributes this form of slavery to most of the ancient Near Eastern legal cultures.⁹³ As one of several examples, he cites *Exodus* 22:2. There a burglar owes a ransom to the householder. If he cannot pay the ransom, the burglar is to be sold “for his theft.”⁹⁴ Similarly, in the *Laws of Hammurabi* (Mesopotamia, ca. 1750 B.C.), when a negligent farmer has flooded the whole district and cannot pay the damages, his neighbors may sell him and his property and divide the proceeds.⁹⁵

Martha Roth gives an example from a Neo-Assyrian document, where, “[u]nable to pay the penalty imposed, the manslayer, his entire household, and his fields have been seized.”⁹⁶ This is consistent with the payment for homicide set out in the *Middle Assyrian Laws* (Mesopotamia, ca. 1076 B.C.), in which a victim may take the wrongdoer or instead receive property or the killer’s daughter or son.⁹⁷ Another Neo-Assyrian trial report appears to provide for the giving into slavery of the robber’s wife and daughter as compensation for his robbery.⁹⁸ Other Mesopotamian reports include one in which a thief is ordered into slavery, but he convinces the king to let the theft victim take the thief’s sister into slavery instead.⁹⁹

For the Lombards, Katherine Fischer Drew explains debt slavery for wrongs simply:

91. See *supra* notes 23-25 and accompanying text.

92. Whitman, *supra* note 25, at 81.

93. Westbrook, *supra* note 38; see also, *Definition and Discussion of Slavery and Serfdom*, *supra* note 38, at 283-97; *From Freedom to Slavery*, *supra* note 38, at 84-85.

94. Westbrook, *supra* note 38, at 1644-45.

95. *Id.* (mentioning *Laws of Hammurabi*, § 53-54).

96. Roth, *supra* note 90, at 356.

97. Roth, *supra* note 4, at 157 (§ A 10). I have used Roth’s date. Klaas R. Veenhof places manuscript A at 1175 B.C. and notes that the laws may go back to the 13th and 14th Centuries B.C. Veenhof, *supra* note 35. Raymond Westbrook dates the Middle Assyrian Laws to the 13th century B.C. Westbrook, *supra* note 38, at 1633. Note that all these dates come from 1995 sources.

98. Westbrook, *supra* note 38, at 1645.

99. *Id.*

If an offender were unable to pay the fine of twenty *solidi* or less, he was to be handed over to the injured party to serve as a debt slave until such time as the sum of the debt was worked out. If, however, the fine involved was a larger sum, the guilty man was turned over to the injured party to serve permanently as a debt slave.¹⁰⁰

Similarly, for the Franks:

It is difficult to know how many Frankish families could pay such sums [large fines as compensation], but it must have often been the case that the money penalties could not be paid. The Frankish laws are clear on this point—a man's entire property and his person were the final security for payment. In the long run then, a man's person must frequently have paid for his offense—in effect, he became a slave to the injured party (perhaps the injured party could inflict death but, given the emphasis on compensation, slavery must have been the usual effect of the law).¹⁰¹

Debt slavery is also found in other Germanic cultures, such as the Visigoths. Indeed, the *Visigothic Code* (Spain, ca. A.D. 654)¹⁰² is noteworthy because several extreme punishments are often mandated together or in the alternative. For example, under the *Visigothic Code*, the punishment for selling or giving away a male or female freeborn person is 100 *solidi*.¹⁰³ But if the person cannot afford to pay it, then the wrongdoer becomes a slave of the victim. Thus, slavery is the explicit alternative for those free persons unable to pay the high fine. If a (debt or chattel) slave did the same wrong to a free person, then 200 lashes, scalping, and perpetual servitude were the punishments.¹⁰⁴ Scott comments that "few penalties are more common than that involving the forfeiture of freedom."¹⁰⁵

Interestingly, the obligation to pay the debt resulting from a serious delict sometimes was explicitly recognized in the form of a debt-note.¹⁰⁶ Martha Roth discusses just such a note binding a village as debtor to pay a debt to the blood relative of a murdered stranger as creditor, if any relatives came forth to claim compensation.¹⁰⁷ In some of the Germanic systems, when the judge had ordered compensation, "the defendant offered security or a pledge for his eventual payment of the decree."¹⁰⁸

100. THE LOMBARD LAWS, *supra* note 27, at 28.

101. THE LAWS OF THE SALIAN FRANKS, *supra* note 76, at 50.

102. THE VISIGOTHIC CODE, *supra* note 83.

103. *Id.* at Book V, tit. IV, § 11.

104. *Id.*

105. *Id.* at xxxvi.

106. Roth, *supra* note 90.

107. *Id.*

108. THE LAWS OF THE SALIAN FRANKS, *supra* note 76, at 37.

Westbrook explains other sorts of debt servitude that perhaps stop just short of slavery, for example, the Old Babylonian practice of “*kiššatum*” in ancient Mesopotamia.¹⁰⁹ Section 117 of the *Laws of Hammurabi* (Mesopotamia, ca. 1750 B.C.) provides for a man selling his wife and children into debt service (*kiššatim*) for three years if he is unable to pay his debts.¹¹⁰ In a Neo-Assyrian document, a father sells his daughter to a creditor to pay for a debt of thirty shekels of silver.¹¹¹

Even in ancient systems that relatively humanely punished most wrongs by private actions to compensate injured parties based on a published price schedule, the “punishment” of debt slavery lurked behind the payments owed—often mandating a payment so high that compromise, kin payments, or slavery were the common outcomes.¹¹² The Welsh *Laws of Hywell DDA* (Wales, ca. 928-1200) provide that if even one penny of the wrongdoer’s penalty is left unpaid, the wrongdoer may be killed for the penny difference, “since the complete cannot come from the incomplete.”¹¹³

Lacking a full-fledged modern liberal distinction between persons and property, ancient societies often deemed people equivalent to property, deemed people a form of property, and deemed them a substitute for debt.¹¹⁴ The evidence here suggests that the commodifica-

109. Westbrook explains:

kiššatum

Like distraint, this Old Babylonian term refers to a non-consensual form of servitude, but in this case it arose *ex delicto*. It appears to have been the penalty for certain minor offenses, such as petty theft.

The basic system of retribution for offenses that would be regarded as crimes in modern legal systems was a dual right that accrued to the victim (or his family): 1) revenge against the culprit (or his family), or 2) the acceptance of a payment by way of ransom in lieu of revenge. This right was a legal right, regulated by the courts who intervened to fix not only the appropriate level of revenge but also, in less serious cases, the appropriate ransom. In the latter case, revenge was only available if the ransom was not duly paid. *Kiššatum* reflected this duality, falling at the lower end of the scale. Revenge was loss of freedom; if the culprit could not pay the ransom . . . , the victim was entitled to take the culprit or members of his family . . . into servitude [until the debt was paid].

Westbrook, *supra* note 38, at 1638.

110. ROTH, *supra* note 4, at 103 (§ 117).

111. Westbrook, *supra* note 38, at 1644.

112. Chattel slavery is also imposed by some systems. In the Sumerian Laws Exercise Tablet, the penalty for an adopted son declaring that his adoptive parents are not his parents is that his parents shall sell him into chattel slavery. ROTH, *supra* note 4, at 44 (§ 4). The Middle Assyrian Palace Decrees (1273-1244 B.C.) also provide for slavery for sons of a wrongdoer. *Id.* at 199 (§ 5).

113. THE LAW OF HYWEL DDA, *supra* note 9, at 146.

114. For a sensitive account of the growing commodification of debt in England under capitalism, see Clinton W. Francis, *Practice, Strategy, and Institution: Debt Collection in the English Common-Law Courts, 1740-1840*, 80 Nw. U. L. REV. 807, 906-07 (1986).

tion of humans was not a capitalist creation. Indeed, one might argue that capitalism (and its political philosophy, liberalism) in some respects *decreased* the commodification of humans, even as Marx is correct that it certainly increased the commodification of their labor. One of the basic tenets of liberalism is the split between person and property¹¹⁵ and the resulting removal of persons themselves from the marketplace. As Western liberal capitalism spread around the world, this distinction helped free the world's slaves, thus reducing the scope of allowable commodification of humans.¹¹⁶ To make the extremely complicated argument hinted at in this paragraph would require my looking at the last 1,000 years of commodification, not the first 3,000 years that is the subject of this Article. I will not make such an effort here. But the tables in this Article suggest serious problems with the standard notions of commodification.

VII. CONCLUSION

If you sin against this treaty . . . may they use you like women in the sight of your enemy.

—The Assyrian Vassal-Treaties of Esarhaddon.¹¹⁷

Although this Article is part of a growing movement to use empirical techniques to analyze legal questions, one cannot understand the world or its history with just numbers. Indeed, most of the world can and should be understood without counting. Even for those parts of existence appropriate to counting, ordinary reasoning is *always* needed to comprehend what the numbers mean.¹¹⁸ One must decide whether the numbers can be generalized to other times and places, what influences might cause the numbers, and which scraps of the richness of real life have been captured in abstractions that we call variables. In part, I am trying to expand in time and place the range

115. See PROPERTY: MAINSTREAM AND CRITICAL POSITIONS 7 (C.B. MacPherson ed., 1978) (MacPherson, critical of private property, nonetheless points out: "The change in common usage, to treating property as the things themselves, came with the spread of the full capitalist market economy from the seventeenth century on . . ."). For both positive and negative views of the effects of markets and contracts on people, see Radin, *supra* note 89, at 1872; NOMOS XXXI, MARKETS AND JUSTICE (John W. Chapman & J. Roland Pennock eds., 1989); Albert O. Hirschman, *Rival Interpretations of Market Society: Civilizing, Destructive, or Feeble?*, 20 J. ECON. LITERATURE 1463, 1483 (1982); Ian R. Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483.

116. See PATTERSON, *supra* note 16.

117. 2 THE ANCIENT NEAR EAST 65, 68 (James B. Pritchard ed., abridged ed. 1975) (Assyrian treaty).

118. See CHARLES E. LINDBLOM & DAVID K. COHEN, *USABLE KNOWLEDGE* (1979).

of questions that might be considered appropriate for quantitative legal analysis.

Nonetheless, the statistical techniques that I used are rudimentary. To locate my analysis in a legal system's context, I have set prices for wrongs as a percentage of the price for harming the fully free class and then averaged the means of the percentages. The use of tests for statistical significance would be inappropriate. Typical significance tests assess sampling error in random sampling. There is no reason to believe that my sample is random, the sample is closer to the population of relevant available provisions than to a sample, and the primary sources of error are (1) coding error due to interpretive problems and (2) the failure to control for other important variables. Some of these uncontrolled variables are demonstrably important, such as who receives the payment (e.g., Gortyn¹¹⁹). Depending on how restrictive the view one takes of the population of interest, sampling error is either trivially small or simply not quantifiable.

A second goal of this Article—and the prime reason that I first suggested this conference—is to try to expose modern law professors and legal theorists to some of the richness of ancient law.¹²⁰ Historians, translators, and area experts do not need to be told this, but we law professors are an ignorant lot. We tend to mine the same veins again and again. Even when we move into new areas—for example, gender studies and critical race studies—we tend not to examine the richness of the ancient past for illustrations of the phenomena we are describing. If one is trying to analogize modern forms of dehumanization, one does not have to look hard in ancient law collections to find similar—sometimes even more brutal—forms. Dehumanization is patent when a lawgiver's idea of corrective justice is to allow the father of a raped daughter to rape the rapist's wife.¹²¹

My approach to examining one form of dehumanization in ancient law has been to examine the relative valuation of slaves, free persons, freed slaves, and nobility. By setting out the prices for wrongs done to various classes of persons, these ancient codes and law collections have several advantages. First, they make one aspect of

119. See *supra* Tables 10-11.

120. The other goal was to expose ancient law experts to some of the work of modern legal theorists with interests in ancient law, such as Saul Levmore, Robert Ellickson, and Geoffrey Miller (and more recently, myself).

121. See ROTH, *supra* note 4, at 174-75 (Middle Assyrian Laws, § A, 55): "If a man forcibly seizes and rapes a maiden who is residing in her father's house [and is an unengaged virgin] . . . , the father of the maiden shall take the wife of the fornicator of the maiden and hand her over to be raped"

the social structure explicit. Second, they frequently put free persons on the same scale, giving a base for comparison generally not available by looking at other sources for price information, such as the prices that slaves fetched at auction.¹²² Third, the lawgivers often solved the incomparability of persons problem in economics by assigning different prices to different classes. Fourth, the ancient lawgivers were more willing than modern lawgivers to reflect social differences in the laws themselves. With less egalitarian rhetoric to contend with, the lawgivers could give freer reign to their prejudices.

So what are the results? According to the data presented here, slaves were valued at a mean of only 33% of a free person. Freed slaves were valued at only 53% of free. Nobility showed a wide variation, averaging 4.65 times the value of a free person.

What historical and theoretical propositions does this Study support, if only suggestively?

(1) Setting just prices was an important feature of almost all ancient legal systems.

(2) The low valuation of slaves and in some systems the high relative penalty for dignitary wrongs against higher classes support the historical view that a distinguishing characteristic of slaves is that they lack honor.¹²³

(3) The ascribed value of slaves across a wide variety of ancient legal systems was remarkably similar (25-47% for codes with more than one relevant provision), suggesting substantial uniformity in the relative social distance between ordinary slaves and ordinary free persons. This finding is particularly striking when one considers that the meaning of "slave" varied across ancient cultures.

(4) The ascribed value of freed slaves and half-free persons was similar and substantially uniform across ancient legal systems (values ranged from 33% to 68%).

(5) Even within the broad classes of slaves or free persons, the differences within systems are sometimes large. For example, some slaves belonging to the king are valued at 33 times more than other slaves. In one instance, wrongs to some nobles are punished 34 times more seriously than wrongs to other nobles.

(6) The different penalty structure in India's *Laws of Manu* (focusing more on the pollution of the wrongdoer than on the harm to

122. Cf. PATTERSON, *supra* note 16, at 168-69 (comparing the value of slaves to money and animals).

123. See *id.* at 13-32.

the victim) suggests that there is no universal pattern governing the social structure of punishment.

(7) Because all societies studied here were significantly stratified, this study lends additional support for contentions that all large observed societies are and have been socially stratified.¹²⁴ Further, the ancients appear to have had a prestige scale that was formally reflected in their laws.

(8) The laws of some ancient societies reflect many fine class gradations, while others reflect only two or three classes.

(9) The mean difference between the values of free persons and the nobility (4.65 to 1) is roughly similar to modern Western notions of the proper income difference between high prestige jobs and low prestige jobs (about 4 to 1 in the United States).¹²⁵

(10) Ancient legal codes show both significant similarities and significant differences. Note that most of the first nine propositions seesaw between those that lean toward uniformity in ancient law and those that lean toward heterogeneity.

(11) Freed slaves were still dependent classes, not far above the class of slaves.

(12) Like the antebellum American South, if an ancient system distinguished between field slaves and household slaves, household slaves were more highly valued.

(13) Slaves performed an extremely wide variety of tasks in ancient societies.¹²⁶

(14) Economic value was in part a determinant of ascribed value recognized by the state. Indeed, highly skilled slaves were sometimes valued above the average free class.

(15) The penalty for wrongs was based, not only on social class, but on economic value, the type of wrong, and who received payment.

(16) Slavery was very common in highly developed ancient societies,¹²⁷ more common than would be suggested by Orlando Patter-

124. See ROBERT MICHELS, *POLITICAL PARTIES* 21-40, 377-92 (Eden Paul & Cedar Paul trans., 1915); Kingsley Davis & Wilbert E. Moore, *Some Principles of Stratification*, 10 AM. SOC. REV. 242 (1945); Melvin M. Tumin, *Some Principles of Stratification: A Critical Analysis*, 18 AM. SOC. REV. 387 (1953).

125. Kelley & Evans, *supra* note 21.

126. See PATTERSON, *supra* note 16, at 299 (a grand vizier in the Ottoman Empire was a slave).

127. M.I. Finley argues that the conditions necessary for slavery were:

[P]rivate ownership of land, with sufficient concentration to require a permanent workforce; a sufficient development of commodity production and of markets; and the unavailability of an alternative, 'internal' labour supply.

FINLEY, *supra* note 30, at 132.

son's estimate that about 35% of a supposedly representative sample of world societies (ancient, modern, and local) had slavery.¹²⁸

(17) A systematic look at the valuation of social classes has allowed me in one case to correct some of the translator's own misconceptions about the code he translated—S.P. Scott's *Visigothic Code*.

(18) Commodification of humans is not a capitalist invention (though the particular kind of commodification that we live under may be).

(19) The scope of empirical legal studies can be profitably extended in time, place, and subject.

Most law and economics scholars who have looked at ancient law have found the invisible hand of efficiency working itself out to near perfection. Although I will not here engage in an analysis of whether these ancient law systems are efficient, the pervasiveness of slavery in almost all of these systems raises a serious challenge to the efficiency of ancient law.

Slavery usually, but not always,¹²⁹ has a strong economic base—and yet, is it efficient for people beyond the slaveowners? It is unlikely (but not impossible) that any slave-based system could be efficient in most non-trivial senses of that word. If efficiency is measured by wealth-maximization, it would be hard to maximize wealth without labor moving to its highest and best use. Slavery prevents this movement. Further, it is certain that widespread chattel slavery could not be based on consent, which some other modern economists posit as a logical prerequisite for efficiency analysis.¹³⁰

128. See PATTERSON, *supra* note 16, at 345-48 (finding slavery in 66 of 186 societies in George P. Murdock's sample of world cultures).

129. See PATTERSON, *supra* note 16 (discussing the ritual slaughter of slaves at celebrations, housebuilding and the like among Northwest Coast Native Americans). "Nothing in the annals of slavery can match the Indians of the U.S. northwest coast for the number of excuses a master had for killing his slaves and the sheer sadism with which he destroyed them." *Id.* at 191. Such brutal extravagance would be unlikely in systems where slave labor was needed; there the brutality takes a different form. And it is anachronistic for Americans, who have the United States situation in mind, to believe that slaves were everywhere purchased primarily for work or sex. See *id.* at 173.

130. If one posits Pareto optimality as the guide, then either these systems are not efficient or they illustrate the irrelevance of Pareto optimality. After all, eliminating slavery would probably make someone worse off. Thus, strictly speaking, almost any existing system—even one as repugnant and wasteful as slavery—cannot be improved without violating Pareto optimality. Kaldor-Hicks efficiency runs up against the same problems as wealth-maximization.

Only some public choice version of efficiency could be plausibly borne out in an ancient slave system. Perhaps these systems are efficient for the slave-owners, who have captured the state and turned it to their own use. But this is not the sort of efficiency that modern law and economics professors have typically found in ancient law. And the relevance of public choice to non-democratic systems is questionable anyway. The system may nonetheless be efficient in the

The data in this Study are consistent with a supposition that law was a tool of enforcing class hierarchy across all ancient legal systems that were sophisticated enough to develop a code of laws. The data does not *prove* that law served this function, because a causal link could be shown only by establishing a counter-factual—what would have happened if the law were different or absent. Perhaps legal rules that look to us as enforcing hierarchy simply reflected what was. Or perhaps they even worked to reduce pre-existing differences—perhaps, but I doubt it. Further, the mere payment of different levels of compensation to different sorts of victims would tend to perpetuate some class differences, by making some richer and some poorer.

On the other hand, these ancient systems suggest that the traditional account of commodification is at least flawed—if not in some sense backwards. Commodification of humans is not an invention of capitalism, appearing to an extreme degree in the ancient law systems sophisticated enough to have promulgated a code or law collection. Commodification is just one of the many theoretical issues that have been too little examined using the strange lights of the ancient law collections.

more limited sense favored by public choice theorists. The powerful may have captured the law and designed it to be economically efficient *for them*.

